Docket for 03-526

(11)

No. 03-526 Status: ARGUED
Title: Dora B. Schriro, Director, Arizona Department of Corrections, Petitioner
v.
Warren Wesley Summerlin
Docketed: October 8, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (98-99002)
Decision Date: September 2, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 23 2003	Petition for writ of certiorari filed. (Response due November 7, 2003)
Oct 24 2003	Brief of respondent Warren Wesley Summerlin in opposition filed.
Nov 5 2003	DISTRIBUTED for Conference of November 26, 2003.
Nov 7 2003	Brief amici curiae of Nebraska, et al. filed. (distributed).
Nov 7 2003	Reply of petitioner Dora B. Schriro, Director, Arizona Department of Corrections filed. (Distributed)
Dec 1 2003	Petition GRANTED limited to Questions 1 and 2 presented by the petition.
Jan 15 2004	Joint appendix filed.
Jan 15 2004	Brief of petitioner Dora B. Schriro, Director, Arizona Department of Corrections filed.
Jan 15 2004	Brief amici curiae of Arizona Voice for Victims, Inc., et al. filed.
Jan 15 2004	Brief amici curiae of Nebraska, et al. filed.
Jan 15 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jan 16 2004	Brief amicus curiae of United States filed.
Feb 6 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 10 2004	Extension of time within which to file respondent's brief on the merits to and including February 26, 2004.
Feb 26 2004	Brief of respondent Warren Wesley Summerlin filed. (Distributed)
Feb 26 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 26 2004	Brief amici curiae of Murder Victims Families for Reconciliation Ms. Susan Hill and Ms. Sally Schauble filed. Distributed)
Feb 26 2004	Brief amici curiae of Welsh S. White, Rudy Gerber, W.J. Michael Cody, and the Southern Center for Human Rights filed. (Distributed)
Mar 2 2004	SET FOR ARGUMENT MONDAY, APRIL 19, 2004.
Mar 3 2004	CIRCULATED.
Mar 12 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Mar 16 2004	Record received from U.S.D.C. of Arizona. (1 box containing 1 sealed folder)
Mar 22 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 1 2004	Reply of petitioner Dora B. Schriro, Director, Arizona Department of Corrections filed. (Distributed)
Apr 19 2004	Argued. For petitioner: John P. Todd, Assistant Attorney General, Phoenix, Ariz.; and on

behalf of the United States, as amicus curiae, James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Ken Murray, Assistant Federal Public Defender, Phoenix, Ariz.

(1)

FILED

SEP 23 2003

No. 03 526

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
PETITIONER,

-vs-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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157 pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 589 (2002), this Court held that the Sixth Amendment jury trial guarantee extends to the determination of any fact, other than a prior conviction, that increases the maximum punishment for first-degree murder from life imprisonment to death. In the instant case, the United States Court of Appeals for the Ninth Circuit held that the rule announced in *Ring* should be applied retroactively to cases on collateral review.

1. Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality)?

2. Did the Ninth Circuit err by holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

3. Did the Ninth Circuit err by applying *Ring* notwithstanding a "prior conviction" aggravating circumstance that, under *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998), need not be found by the jury?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment denying federal habeas relief on Summerlin's state death sentence, finding that this Court's decision in *Ring* applied retroactively to cases on collateral review. *Summerlin v. Stewart*,[1] No. 98-9902, slip op. (9th Cir. Sept. 2, 2003) (en banc) (Appendix A).

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on Sept. 2, 2003. Petitioner has timely filed its petition for Writ of Certiorari within 90 days of that decision. The jurisdiction of this Court is invoked under the United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and United States Supreme Court Rule 10.

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1. Pursuant to Federal Rules of Appellate Procedure 43(c), Petitioner requests that Dora Schriro, the recently appointed Director of the Arizona Department of Corrections, be substituted as successor in office for Terry Stewart.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

In June 1982, a jury convicted Summerlin for the 1981 sexual assault and murder of Brenna Bailey. The trial judge found two aggravating circumstances, either of which rendered Summerlin eligible for a death sentence under Arizona's capital sentencing statute then in effect: (1) Summerlin had a prior felony conviction involving the use or threat of violence against another person; and (2) Summerlin committed the murder under especially cruel, heinous or depraved circumstances—the victim suffered mental terror during the sexual assault and murder, and Summerlin crushed her skull from all sides after raping her. The court imposed the death penalty after it found no mitigating circumstances sufficient to call for leniency.

The Arizona Supreme Court affirmed Summerlin's convictions and sentences. *State v. Summerlin*, 675 P.2d 686 (Ariz. 1983). In his direct appeal, Summerlin argued that Arizona's death penalty statute violated the Sixth Amendment jury trial guarantee because it required a trial judge to determine the circumstances necessary to impose the death penalty. Relying on *Proffitt v. Florida*, 428 U.S. 242 (1976), the Arizona Supreme Court rejected that argument. *Summerlin*, 675 P.2d at 695. Summerlin's direct appeal became final on April 17, 1984, when time elapsed for seeking review by this Court.

Following state post-conviction collateral proceedings, in April 1986, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Summerlin filed a preliminary petition for federal habeas relief. Relying on *Walton v. Arizona*, 497 U.S. 639 (1990), the district court denied Summerlin's Sixth Amendment sentencing claim, along with his other claims. In March 1998, Summerlin appealed the district court's judgment, arguing among other claims that *Jones v. United States*, 526 U.S. 227 (1999), implicitly overruled *Walton*. The State of Arizona argued that *Walton* remained the law and that, in any event, *Teague v. Lane*, 489 U.S. 288 (1989), barred applying *Jones* to Summerlin's case.

When the Ninth Circuit heard the case, it characterized the Sixth Amendment sentencing claim as an "*Apprendi*" claim. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Relying on *Walton*, the Ninth Circuit panel rejected the *Apprendi* claim along with Summerlin's other claims. However, the panel remanded the case for an evidentiary hearing to determine whether the trial judge was impaired by marijuana use during the trial and sentencing in 1982–83. *Summerlin v. Stewart*, 267 F.3d 926, 956–57 (9th Cir. 2001) (*withdrawn*).

Summerlin and Arizona petitioned for en banc review. While those petitions were pending, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). The Ninth Circuit judges voted to hear the case en banc and asked the parties to file simultaneous briefs addressing whether *Teague* bars retroactive application of *Ring* to cases on collateral review.

The Ninth Circuit held that *Ring* announced a new rule. The court also found that the rule announced in *Ring* does not fall within *Teague*'s first exception to the general rule of non-retroactivity that places conduct beyond a legislature's power to proscribe or punish. (Appendix A, at 44; slip. op. at 12759–60.)

Nevertheless, a majority of the en banc panel held that *Ring*'s rule applies retroactively. The court reached this conclusion on two alternative theories. First, the court found that *Ring* changed the substantive statutory law of Arizona by creating a "capital murder" offense. (Appendix A, at 28–41; slip. op. at 12740–55.) New substantive rules are applied retroactively. *See Bousley v. United States*, 523 U.S. 614, 620 (1998). Second, the court concluded that to the extent *Ring* announced a procedural rule, it was a "watershed" rule falling within *Teague*'s second exception to non-retroactive application of new constitutional rules of criminal procedure. (Appendix A, at 44–63; slip. op. at 12760–79.) The majority reserved deciding any of the other penalty-phase errors raised on appeal or Summerlin's cumulative error claim. (*Id.* at 65; slip. op. at 1271.) The court affirmed the district court's judgment denying federal habeas relief on Summerlin's state convictions for sexual assault and murder.

Three members of the en banc court disagreed with both theories. The dissenters pointed out that appellate courts (including the Ninth Circuit) that have addressed the question of whether *Apprendi* applies retroactively have concluded that it does not. Because *Ring* is an application of *Apprendi* to capital cases, there is no logical basis for distinguishing between their respective new rules for *Teague* purposes. (Appendix A, at 70–74; slip. op. at 12789–91.) The dissenters also rejected the majority's conclusions that the rule announced in *Ring* comes within *Teague*'s second exception by altering our understanding of bedrock procedural principles and is exempt from harmless error analysis. The dissenters noted that the majority's position is inconsistent with this Court's suggestion in *Ring* that the underlying Sixth Amendment violation is subject to harmless error analysis. (*Id.* at 82–83; slip. op. at 12799–800.) Finally, the dissenters took issue with the majority's conclusion that jury participation in the sentencing process seriously increases the accuracy of the sentencing proceeding. (*Id.* at 78–82; slip. op. at 12795–99.)

REASONS WHY THE WRIT SHOULD ISSUE

This case merits review by this Court for at least four reasons. First, the Ninth Circuit's decision below directly conflicts with the holdings of the Arizona Supreme Court in *State v. Towery*, 64 P.3d 828 (Ariz. 2003) on two important federal questions, creating an impasse in capital litigation: (1) Did *Ring* announce a substantive rule? (2) If not, does the *Ring* rule come within *Teague*'s second exception as a watershed procedural rule? (Appendix B, at ¶¶ 10–13; 17–22.) Second, the Ninth Circuit's decision expressly conflicts with the decisions of the Eleventh and Tenth Circuit Courts of Appeal and with decisions of other state appellate courts of last resort. Other federal and state courts await this Court's ruling on these federal questions. Third, the Ninth Circuit's unique conclusion that a new constitutional rule should be applied retroactively to cases on collateral review if the rule can be read to have a substantive gloss injects confusion into this Court's *Teague* jurisprudence. Fourth, by not addressing the issue of whether Summerlin's violent prior felony constitutes an aggravating circumstance exempt from the *Ring* analysis, the Ninth Circuit implicitly decided an important federal question in a way that conflicts with *Ring*, *Apprendi*, and *Almendarez-Torres*.

1. The Ninth Circuit's decision on an important federal question squarely conflicts with a decision by the Arizona Supreme Court.

This Court held in *Apprendi* that under the Sixth Amendment a non-capital defendant cannot be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. 466, 483 (2002) (emphasis in original).

In *Ring*, this Court extended the reasoning of the *Apprendi* rule to capital cases, overruling in part *Walton v. Arizona*, 497 U.S. 639 (1990). This Court held that because Arizona's capital sentencing statutes did not expose a defendant convicted of first-degree murder to the death penalty until at least one aggravating circumstance is found,

a jury, rather than a judge, must determine whether such a circumstance exists.

In the instant case, the en banc panel of the Ninth Circuit concluded that the holding in *Ring* entitles Summerlin to have a jury find the two aggravating circumstances present in his case that exposed him to the death penalty.

However, this Court held in *Teague* that new constitutional rules of criminal procedure do not apply to cases that become final before the new rules are announced. 489 U.S. at 310. *Teague* provides two exceptions to the general rule against retroactive application: First, the new rule applies retroactively if it places a class of private conduct beyond the power of the criminal law-making authority to proscribe or punish. *Id.* at 311. Second, the new rule applies retroactively if (1) it is a watershed rule that "alters our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," *id.* (quoting Justice Harlan's opinion concurring and dissenting in part in *Mackey v. United States*, 401 U.S. 667, 693 (1971)) (internal quotation marks omitted; emphasis added in *Teague*), *and* (2) without the new rule "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

Relying principally on this Court's decisions in *Bousley v. United States*, 523 U.S. 614 (1998), and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), and Ninth Circuit decisions in *United States v. Montalvo*, 331 F.3d 1052 (9th Cir. 2003), and *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the Ninth Circuit held in the instant case that *Ring* announced a substantive new rule for Arizona law that falls outside the scope of *Teague*:

> A careful analysis of the structure and history of the relevant Arizona statutes, coupled with a close examination of the underlying rationale of *Ring* and the Supreme Court's related jurisprudence, reveals that *Ring* is, as to Arizona, a "substantive" decision, even if its form is partially procedural.

. . . .

> *Ring* confirmed what we stated in *Adamson* [*Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc)]: Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense.

(Appendix A, at 32, 36; slip. op. at 12745, 12749.)

Alternatively, the Ninth Circuit concluded that *Ring* fell within *Teague*'s second exception:

> In addition to *Ring*'s substantive effect on Arizona law, a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review.

(*Id.* at 42; slip. op. 12758.)

> The rule announced in *Ring*, like other watershed rules, is designed to reduce significantly the risk of an erroneous capital verdict. Thus, the rule announced in *Ring* defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. *Ring* satisfies the criteria of *Teague* and must be given retroactive effect on habeas review.

(*Id.* at 63; slip. op. 12779–80.)

On each of these important federal questions, the Arizona Supreme Court reached the opposite conclusion in *State v. Towery*. In rejecting the petitions for review from post-conviction relief proceedings in that consolidated case, the Court held that the rule in *Ring* does not apply retroactively to cases on collateral review:

> Petitioners assert that *Ring II* [this Court's opinion in *Ring*] announced a substantive rule because it determined the essential elements of capital murder in Arizona. They argue that *Ring II* refined the definition of an element of capital offenses, which is unquestionably a substantive decision. We disagree. Although the Supreme Court recognized that Arizona's aggravating factors operate as the functional equivalent of an element of a greater offense, *Ring II* did not announce a substantive rule.

(Appendix B, at ¶ 11; *Towery*, 64 P.3d 828, ¶ 11 (Ariz. 2003).[2]

> The new rule of criminal procedure announced in *Ring II* thus does not meet either of the exceptions to *Teague*'s general rule that new rules do not apply retroactively to cases that have become final.

Id. at ¶ 25; *Towery*, 64 P.3d at ¶ 25.

This direct conflict in the law creates a morass for capital litigation in Arizona. Currently, 88 prisoners under state judgments of execution are *not* entitled to relief in state court under *Towery*, but *are* entitled to relief in federal court under the Ninth Circuit's decision below. *But see* 28 U.S.C. § 2244(b)(2)(A) (limitation on successive federal habeas applications). Only this Court can break this legal stalemate.

2. The Ninth Circuit's holdings on these important federal questions clash with express holdings of other United States Courts of Appeal, as well as with other state appellate courts of last resort.

The Tenth Circuit reached the opposite conclusion from that of the Ninth Circuit on whether *Ring* created a substantive or procedural rule

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2. Towery petitioned this Court for a Writ of Certiorari to the Arizona Supreme Court, but moved to dismiss his petition after the Ninth Circuit issued its *Summerlin* decision.

for purposes of a *Teague* analysis. In *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), the court reasoned that their holding in *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002), that *Apprendi* was a procedural rule compelled a finding that *Ring* similarly implicates a procedural rule:

> Cannon's attempt to distinguish *Ring* from *Apprendi* is unconvincing, and this panel is bound by the determination in *Mora* that *Apprendi* established a new rule of criminal procedure.

Cannon, 297 F.3d at 224.

The Eleventh Circuit also arrived at the opposite conclusion from that of the Ninth Circuit regarding this important federal question. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the court held that *Teague* barred Turner's *Ring* claim:

> *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. [citation omitted] *Ring* changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. *Ring* affected neither the facts necessary to establish Florida's aggravating factors nor that State's burden to establish those factors beyond a reasonable doubt. Instead, *Ring* altered only *who* decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.
>
> Our conclusion that *Ring* announces a procedural rule is bolstered by *Ring*'s status as an extension of *Apprendi*. We agree with other courts who have concluded that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule.

Turner, 339 F.3d at 1284 (emphasis in original); *cf. United States v. Gonzales*, 327 F.3d 416, 417–22 (5th Cir. 2003) (the rule announced in *Castillo v. United States*, 530 U.S. 120 (2000), is procedural, not substantive, because it shifted the fact-finding responsibility from judge to jury, and did not alter the meaning of the fact to be found); *Brice v. State*, 815 A.2d 314, 321 (Del. 2003) (the statutory change prompted by the *Ring* decision that required jurors to find the existence of at least one aggravating circumstance beyond a reasonable doubt was procedural, not substantive).

Contrary to the Ninth Circuit, the Eleventh Circuit also concluded that the rule in *Ring* did not fall within the second *Teague* exception:

> *Ring* is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. *Ring* simply does not fall within the ambit of the second *Teague* exception.

Turner, 339 F.3d at 1286; *cf. Gonzales*, 327 F.3d at 422 (the *Castillo* rule also does not fall within the second *Teague* exception).

The Nevada Supreme Court also reached the opposite conclusion from the Ninth Circuit on this issue. In deciding whether *Ring* should apply retroactively, the Nevada Supreme Court first adopted the "general framework of *Teague*," but reserved its prerogative "to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity." *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002). The court then concluded, under a non-retroactivity exception "at least as broad" as *Teague*'s second exception, *id.*, that *Ring* did not fall within *Teague*'s second exception:

> *Ring* established that jurors, not judges, must make any factual findings necessary for imposition of the death penalty. Is this a procedure without which the likelihood of an accurate conviction—or, in this case, a sentence—is seriously diminished? We conclude that it is not. The Supreme Court

> in *Ring* did not determine that factfinding by either juries or judges was superior in capital cases. . . . [W]e believe it is clear that *Ring* is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencing, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state. We conclude therefore that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence.

Id. at 473.

The Supreme Court of Nebraska followed the same analysis in *State v. Lotter*, 664 N.W.2d 892, 904–08 (Neb. 2003), holding that the new constitutional rule announced in *Ring* was procedural, not substantive, and that it did not fit within *Teague*'s second exception. Thus, *Lotter* also squarely conflicts with the Ninth Circuit's holding in this case. *Cf. People v. Bradbury*, 68 P.3d 494, 499 (Colo. 2002) (finding nothing in *Ring* that would compel or suggest that *Apprendi* be applied retroactively). *But see State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (rejecting the *Teague* analysis, and applying *Ring* retroactively under this Court's prior test for retroactive application).

Other federal and state courts have declined to apply *Ring* to convictions that were final on the date *Ring* was decided. *Whitfield v. Bowersox*, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc); *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

This Court should accept certiorari in this case to resolve the conflict that now exists between the Ninth Circuit and every other reported federal circuit and state court of last resort that, to date, has decided these two *Teague* retroactivity questions. Without such

resolution, capital defendants in the same procedural posture will be treated differently.

3. Left intact, the Ninth Circuit's view of substantive changes will spawn uncertainty in capital litigation and confound future attempts to apply the *Teague* analysis.

In deciding that *Ring* was substantive in part, the Ninth Circuit relied on *Bousley v. United States*, 523 U.S. 614, 620 (1998). In *Bousley*, this Court stated:

> And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the *meaning* of a criminal statute enacted by Congress.

(Emphasis added.) "This distinction between substance and procedure is an important one in the habeas context." *Id.* Citing to *Bousley*, the Ninth Circuit correctly stated, "a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute." (Appendix A, at 29; slip. op. at 12741–42.)

The Ninth Circuit erred, however, in applying that principle to Arizona's capital *sentencing* statute. In *Ring*, this Court did not decide the *meaning* of the Arizona capital sentencing statute. Nor did this Court alter the scope of or modify Arizona's capital sentencing statute. It did not redefine any statutory construction, nor did the parties dispute the meaning of any statutory provision. Nevertheless, the Ninth Circuit concluded that *Ring* was substantive in nature for Arizona and therefore outside the clearly established bounds of *Teague*. (*Id.* at 28–42; slip. op. at 12740–55.) The majority stated in part:

> [W]e respectfully disagree with *Towery*'s conclusion that *Ring*'s rule is entirely procedural. *Ring*'s invalidation of Arizona's capital murder statute under the United States Constitution did more than alter "who decides." *Towery*, 64 P.3d at 833. It restructured Arizona law and it redefined, as

> a substantive matter, how that law operates. It is, thus, incorrect to conclude that the repositioning of aggravating factors as elements of a separate offense did not constitute a "substantive" rule. Such a construction ignores that *Ring*'s restructuring of the elements of the separate offense of capital murder is, at the very least, a determination of the "meaning of a criminal statute," which is precisely the kind of decision that *Towery* itself recognizes as "substantive."

(*Id.* at 40; slip. op. at 12753.)

This boundless interpretation of the term "substantive" opens the door to untold litigation. *Teague* clarified how "the question of retroactivity should be resolved for cases on collateral review." *See Teague*, 489 U.S. at 300. *Summerlin* corrupts the *Bousley* rule to create uncertainty surrounding when a new rule will apply to any criminal case that has become final. And it injects doubt as to whether *Apprendi*, the precursor of *Ring*, is applicable to cases on collateral review. Although the Ninth Circuit struggled to draw a Sixth Amendment distinction between the Arizona and the New Jersey laws at issue in the two cases, that distinction is unconvincing.

Furthermore, if this Court's decision in *Ring* is substantive, it invites the argument that Arizona cannot reimpose a death sentence under its newly amended capital sentencing statute without violating the *Ex Post Facto* Clause, or even the Double Jeopardy Clause. Regardless of the merit of any such claim, it is another issue that will prolong capital litigation and foster uncertainty.

4. Because the trial court found a prior conviction, this case is outside the holding of *Ring*.

The trial court found that Summerlin had a prior felony conviction involving the use or threat of violence against another person. Under *Almendarez-Torres*, the Sixth Amendment jury trial guarantee does not extend to findings of prior convictions. 523 U.S. at 226. *Ring* did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

Ring, 536 U.S. at 597 n.4 (because no aggravating circumstance in *Ring* related to past convictions in his case, he did not challenge *Almendarez-Torres*). Although Arizona argued below that this fact removed the *Summerlin* case from the holding of *Ring*, the Ninth Circuit did not address this argument.

Because the trial court in this case found that Summerlin had been convicted of a violent felony prior to his capital sentencing hearing, Summerlin was exposed to the death penalty, and this case is outside the scope of the holding of *Ring*.[3]

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3. Questions regarding the scope of the *Ring* holding, including a question of whether a finding of harmless error regarding the aggravating circumstance of a prior conviction for a violent felony, are pending before this Court in the State of Arizona's Petition for a Writ of Certiorari in *Arizona v. Pandeli*, No. 03-15.

CONCLUSION

This case merits review to settle issues important to the administration of the death penalty. The Ninth Circuit's resolution of two important federal questions is directly contrary to the opinions of other federal circuit courts of appeal and state courts of last resort. Unless overturned, *Summerlin* directly controls federal capital habeas cases in Ninth Circuit states where judges made some or all of the capital sentencing decisions before this Court's ruling in *Ring* (Arizona, Nevada, Idaho, and Montana). *Summerlin* will also create uncertainty regarding the applicability of *Ring* in other jurisdictions (Colorado, Nebraska, Alabama, Delaware, Florida, and Indiana) where judges made relevant sentencing decisions pre-*Ring*.

Left intact, the Ninth Circuit's interpretation of *Ring* will result in extensive litigation over this Court's settled *Teague* jurisprudence. In the interest of fairness to the parties and to homicide victims, the issue of *Ring* retroactivity should be addressed and resolved by this Court. Accordingly, and based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

Volume 1 of 2

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WARREN WESLEY SUMMERLIN,)		
Petitioner-Appellant,	)	No. 98-99002
v.	)	D.C. No.
TERRY L. STEWART, Director of	)	CV-86-00584-ROS
Arizona Department of Corrections,	)	OPINION
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
October 10, 2000—Pasadena, California
Opinion Filed October 12, 2001
Withdrawn February 11, 2002
Order Granting En Banc Hearing
November 23, 2002
Argued and Submitted December 10, 2002

Filed September 2, 2003

Before: Mary M. Schroeder, Chief Judge, and
Harry Pregerson, Stephen Reinhardt,
Diarmuid F. O'Scannlain, Michael Daly Hawkins,
Sidney R. Thomas, M. Margaret McKeown,
Kim McLane Wardlaw, Raymond C. Fisher,
Richard C. Tallman, and Johnnie B. Rawlinson,
Circuit Judges.

Opinion by Judge Thomas;
Concurrence by Judge Reinhardt;
Dissent by Judge Rawlinson

COUNSEL

Ken Murray and Leticia Marquez, Federal Public Defender's Office, Phoenix, Arizona, for the petitioner-appellant.
John Pressley Todd, Attorney General's Office, Phoenix, Arizona, for the respondent-appellee.

OPINION

THOMAS, Circuit Judge:

In this appeal we consider whether the district court erred in denying a writ of habeas corpus sought as to petitioner's conviction and death sentence. We affirm the district court's judgment as to the conviction. However, we conclude that the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively so as to require that the penalty of death in this case be vacated.

I

It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, "truth is often stranger than fiction because fiction has to make sense."

There is no doubt that Warren Summerlin is an extremely troubled man. He has organic brain dysfunction, was described by a psychiatrist as "functionally retarded," and has explosive personality disorder with impaired impulse control. His father was a convicted

armed robber who was killed in a shootout. As a youth, his alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. At his mother's behest, he received electroshock treatments to control his explosive temper. He dropped out of school in the seventh grade due to dyslexia and committed numerous petty juvenile offenses. In 1975, he was diagnosed as a paranoid schizophrenic and treated with the anti-psychotic medication Thorazine.

Before his murder conviction, his only dangerous adult felony was a conviction for aggravated assault. That conviction arose out of a road rage incident in which a car veered off the road, jumped the curb and struck Summerlin's wife, who was hospitalized for her injuries. At the scene, Summerlin brandished a pocket knife at the errant driver, an act that occasioned the filing of the criminal assault charge. Summerlin was not convicted of this offense until after these capital proceedings had commenced. However, this conviction later served as one of two statutory aggravating factors that qualified Summerlin for the death penalty.

On the morning of April 29, 1981, Brenna Bailey, a delinquent account investigator for Finance America, went to Summerlin's home to speak with Summerlin's wife about an overdue account. When Bailey's boyfriend, Marvin Rigsby, learned that she had not returned to work as scheduled, he obtained the addresses of the places she had planned to visit that day and began to retrace her travel. In the early evening, he spoke with Summerlin, who told Rigsby that Bailey had left that residence at 10:30 a.m. The woman residing at the next address Bailey was slated to visit told Rigsby that she had been home all day and had not received a visit from anyone. After making additional attempts to find Bailey, Rigsby reported Bailey's disappearance to the police that evening.

Later that evening, the police received a tip from a female caller to an anonymous crime hotline service who stated that she believed that the missing woman from "Pacific Finance Company" had been murdered by Summerlin, who had rolled up the victim's body in a carpet. The caller later was identified as Summerlin's mother-in-law

who testified that the basis of her information was her daughter's extra-sensory perception.

Early the next morning, a road paving crew outside a market approximately a mile from the Summerlin residence alerted the market's manager to a smell emanating from the trunk of a parked car, later determined to have been owned by Bailey. The manager recognized the odor as that of a decaying body and telephoned the police. Upon arrival, the officers observed a pair of panties, pantyhose, and shoes on the floorboard of the back seat. They forced open the trunk and found Bailey's body, wrapped in a bloody bedsheet. Her skull was crushed, and she was partially nude.

The police obtained a search warrant for the Summerlin residence and found numerous items of incriminating evidence. After the search warrant was read to Summerlin, he stated, "I didn't kill nobody." When the detective did not respond, Summerlin asked: "Is this in reference to the girl that was at my house?" In response to the officer's inquiry as to which girl he was referring, Summerlin described Bailey. Summerlin's wife identified the bloody bedspread found with the victim as belonging to the Summerlin household. Summerlin was then arrested for the murder of Brenna Bailey. At the police station, Summerlin asked to speak to his wife and then made several incriminating statements while police officers were within listening distance.

The state trial court appointed the public defender's office to represent Summerlin. The first attorney assigned to the case moved for a mental competency examination pursuant to Ariz. R. Crim. P. 11. Thereafter, the assigned attorney left the public defender's office, and an attorney whom we shall refer to as "Jane Roe" was designated to represent Summerlin.

In June 1981, Summerlin was examined by two court appointed psychiatrists, Drs. Maier Tuchler and Otto Bendheim. Each found him competent to stand trial and legally sane under the *M'Naghten* standard, which then governed the determination of competency under Arizona

law. Although there was no evidence of mental disease or defect, Dr. Tuchler observed that dyslexia and illiteracy made Summerlin "functionally mentally retarded." He further found that Summerlin's impulse control was extremely impaired due to an explosive-type personality disorder and that he had an antisocial personality. Upon reading the reports, Judge David G. Derickson found Summerlin competent to stand trial.

During this time period, Roe had conversations with Dr.Leonardo Garcia-Bunuel, a psychiatrist who treated Summerlin at the Maricopa County Jail, regarding a possible diagnosis of psychomotor epilepsy. Summerlin had described to Dr. Garcia-Bunuel details of the murder, particularly his experiences of sensing an intense perfume odor, and this led Dr. Garcia-Bunuel to suspect that Summerlin may have had a temporal lobe seizure at the time of the killing. Subsequently, in August 1981, Roe arranged for neurological testing by Dr. Mark Winegard. An electroencephalogram (EEG) showed some slowing in Summerlin's posterior temporal area but was insufficient to support a diagnosis of epilepsy. CAT scans and a second EEG performed in October 1981 were normal. As a result, Dr. Garcia-Bunuel withdrew his concerns.

Roe also secured a psychological evaluation of Summerlin from Dr. Donald Tatro in November 1981. Although concluding there was no evidence to support an insanity defense, Dr. Tatro found indications of organic brain impairment, borderline personality disorder, and paranoid personality disorder. In Dr. Tatro's opinion, Summerlin "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused."

In November 1981, Roe began plea negotiations with the prosecution and obtained an extremely favorable plea agreement, which Summerlin entered into on November 17, 1981. The prosecutor, whom we will call "John Doe," had been willing to enter into the agreement because he did not believe that the offense satisfied the Arizona legal

standard of "heinous, cruel and depraved." At the time, Summerlin had not been convicted of the aggravated felony arising out of the road rage incident, so it did not qualify as an aggravating factor under Arizona's capital sentencing statute. *See* Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended in 1993). Thus, Doe did not believe that Summerlin had committed a capital offense.

Under the proposed plea agreement, Summerlin was to enter an *Alford* plea, *see North Carolina v. Alford*, 400 U.S. 25 (1970), which enabled him, without admitting guilt, to plead guilty to second-degree murder and aggravated assault and to be sentenced accordingly. The agreement stipulated that Summerlin would be sentenced to twenty-one years in prison for the murder of Ms. Bailey, of which he would be required to serve fourteen. In exchange, Summerlin would plead guilty to aggravated assault for the road rage incident with a maximum sentence of fifteen years and would admit that he violated his probation in another case charging burglary. The plea agreement provided that Summerlin's sentences on the three charges would run concurrently. However, the agreement was subject to court approval. If the court rejected the stipulated sentence, Summerlin could either (1) allow his plea to stand and be sentenced to a term of up to thirty-eight-and-one-half years, according to the court's sole discretion, or (2) withdraw from his plea of guilty and have the matters proceed to trial and disposition.

On the day he entered the plea, Summerlin properly answered all the questions required to validate his *Alford* plea. He had second thoughts a few days later, however, and formally sent to the court a *pro se* motion to withdraw his plea and to fire his public defender. In a court appearance on December 15, 1981, scheduled to address his motion, Summerlin openly registered dissatisfaction with the plea, the stipulated sentence, and Roe's handling of his case.

After hearing his complaints, Judge Derickson denied Summerlin's motions, but took the occasion to inform Summerlin that it was his intention on the upcoming sentencing date not to accept the stipulated sentence. Therefore, Summerlin would have the option either

to withdraw from the plea or to allow it to stand and be sentenced accordingly.

Realizing that her client's intention to withdraw from the agreement might again make him eligible for the death penalty, Roe promptly attempted to have the case transferred to another judge who might look more favorably on the deal. On December 18, 1981, the presiding judge denied her motion to disqualify Judge Derickson on the ground of prejudice towards her client and allowed Judge Derickson to continue with the case.

That same evening, Roe attended a Christmas party. She and prosecutor Doe left the party together and had what she later described as a "personal involvement . . . of a romantic nature." As a result of that, as she later testified, she felt she "could no longer ethically represent Mr. Summerlin." Because of the circumstances, she believed "that it would be appropriate for another Public Defender to handle the case and take it to trial, since it looked like it might be a trial at that point, because Mr. Summerlin indicated he wanted a trial and Judge Derickson had indicated he was going to reject the plea." She reported the situation to her supervisor, and it was determined that the entire office probably was compromised.

Notwithstanding her belief that she could not represent Summerlin due to a personal conflict of interest, Roe took no immediate steps to accomplish her withdrawal. Neither she nor her office informed either the court or their client of her conclusion that she could no longer be Summerlin's attorney. Instead, she accompanied him to and represented him at the next hearing before Judge Derickson on December 22, 1981.

At the hearing, Judge Derickson advised Summerlin of his decision not to be bound by the sentencing part of the plea agreement, and that if Summerlin allowed his plea to stand, he was facing up to thirty-eight-and-one-half years in prison for the three offenses. After some confusion during which Summerlin told the court twice that he did not understand the Judge's explanation of the sentence he now

might face, Roe privately conferred with her client. Their discussion ended with Roe's statement to the court, "I believe he understands, your Honor." Summerlin's immediate response was, "No, I don't understand," to which Roe replied, "Then what is your question?" Summerlin then asked about the number of years he might face on the three charges. Judge Derickson explained again the sentence that Summerlin would face if he permitted his plea to stand. To this Summerlin said that he finally understood, adding, "Okay. I would like to withdraw from my plea agreement. Is that what you want me to say?" Judge Derickson appropriately told Summerlin that he did not "want" Summerlin to say that, he simply wanted to make sure that Summerlin understood what would happen if he permitted the plea to stand. This exchange prompted another confidential discussion between Summerlin and Roe, followed by Summerlin's statement that, "It says, if this plea agreement should be changed in any way, I can withdraw." "Yes, that's the question he asked you," Roe replied. Summerlin then withdrew from the agreement. The court immediately reinstated his pleas of not guilty to the two consolidated cases, vacated its findings in the pending probation violation matter, and ordered that the matters be sent to the presiding judge for trial setting. Summerlin's courtroom decision to withdraw his plea made him eligible for a conviction of first-degree murder and a sentence of death.

At this point in the hearing, Summerlin moved once again for new counsel. Roe remained silent. The court denied his motion, stating that "the record may further reflect that you failed to establish any grounds upon which counsel should be changed." Judge Derickson later submitted an affidavit indicating that had he then known of the conflict, he would have granted Summerlin's request to change counsel and would have continued the proceeding rather than proceeding with the plea colloquy.

On December 28, 1981, six days after Summerlin withdrew his plea, Roe finally broached the problem with Doe. On behalf of her client, she wanted Doe to stay on the case because he favored disposing of it with a lesser plea. He could discern no reason to step down as the prosecutor. After this discussion, a hearing was arranged for December

28, 1981, at which Roe planned to move to withdraw as counsel and to permit the rest of the Public Defender's Office to withdraw also. By this time, the case had been assigned to another judge, Judge Riddel, for trial. On December 28, Judge Riddel's calendar was being handled by Judge McCarthy. Roe did not inform Summerlin of her intent to seek withdrawal or of the conflict that had precipitated her decision. At the hearing, Judge McCarthy began by noting that it had been "brought to the attention of the Court that defendant Mr. Summerlin is dissatisfied with the legal representation he is presently receiving." The judge asked Summerlin if that was correct, to which Summerlin responded, "Yes, sir." The judge then noted that he had spoken with counsel in chambers "and apparently it is their feeling that it would be in the best interest of justice that new counsel be appointed." Judge McCarthy then appointed George Klink, a private practitioner, as new counsel. Following the reassignment of counsel, Roe did not advise Summerlin of her conflict of interest because she saw "no reason to beat a dead horse." Klink then assumed representation of Summerlin in both of the charges stemming from Bailey's murder and in the separate charge of aggravated assault arising out of the road rage incident, which was unrelated to the murder.

Approximately six weeks later, the Arizona Attorney General's Office assumed control of the prosecution due to the conflict of interest between Doe and Roe. The Attorney General made it plain that the case would not be settled by way of a lesser plea. Klink filed a motion disqualifying Judge Riddel, and Summerlin's murder case was then assigned to Judge Philip Marquardt.

Klink had intended to disqualify Judge Riddel as to the separate aggravated assault charge filed on the basis of the road rage incident. However, he failed to take the appropriate measures to accomplish this aim. After discovering this, Klink moved for a continuance of the assault trial because he was unprepared. His motion was denied and the assault trial proceeded. Klink called only one witness, Summerlin's wife. Summerlin was convicted of aggravated assault and this conviction served several months later as one of the two aggravating circumstances in the penalty phase of his murder trial.

Klink spoke with Roe about the murder case and the medical reports. However, he never spoke with any of the experts who had interviewed Summerlin. He attempted to get another psychiatric expert, but he failed.

Klink's main defense theory for the murder trial was Summerlin's putative lack of premeditation. Klink presented no evidence supporting that theory. He cross-examined several prosecution witnesses in an attempt to cast reasonable doubt on the rape charge as a way of proving lack of premeditation. Because the prosecution offered no psychiatric evidence, Klink could not cross-examine anyone regarding Summerlin's psychiatric problems and how they would affect his ability to premeditate the murder. Klink called only one witness, Roe, and he only asked her a few questions in order to impeach one of the coroner's statements regarding the length of time seminal fluid remains in the body. The entire case lasted only four days, and the jury was out for a little over three hours. The jury found Summerlin guilty of both first-degree murder and sexual assault.

The judge set a sentencing hearing to hear testimony and argument on aggravating and mitigating circumstances approximately one month after the verdict. In that month, Klink never met with Summerlin. Klink knew that the prosecution planned to call Drs. Tuchler and Bendheim at sentencing, but he never contacted either of them. Klink knew that Summerlin had been convicted of only one dangerous felony—the aggravated assault that Klink had tried before another judge. He also knew of mitigating circumstances surrounding that assault, including that the victim was not physically harmed and that Summerlin's reaction was in response to witnessing the woman striking his wife with her car. Klink nonetheless did not present this information to the judge. Klink prepared no evidence regarding Summerlin's social history despite references in Dr. Tatro's report that Summerlin possibly experienced severe physical and emotional abuse in his childhood.

The sentencing hearing commenced on the afternoon of July 8, 1982. It was an extremely short proceeding, extending only twenty-six

transcript pages, more than half of which constituted colloquy between counsel and the court. The court first entertained argument on the defense motion for a new trial, which the judge indicated he would consider over the weekend. The State's aggravation case consisted of only one exhibit, specifically certified copies of documents relating to the aggravated assault conviction. The State then asked the judge to consider the trial testimony and rested its case. The entirety of the State's aggravation case was recorded in one page of transcript.

For the defense case in mitigation, Klink called Dr. Tatro to the stand. However, before the witness could be sworn in, Summerlin interrupted and—although the conversation is not in the trial transcript—apparently requested that his attorney not present Dr. Tatro. Klink requested a five-minute recess, at the conclusion of which he stated: "With the consent of the Defendant, the Defendant has no witnesses in mitigation at this time and . . . we'll rest." The judge then reminded Klink and Summerlin that this was the time set aside for the aggravation and mitigation hearing and that he planned to proceed with sentencing the next Monday. The judge then said, "so you tell me that you have one witness that you may present on Monday?" Klink replied: "Well, I would not call any witnesses at all." The judge then indicated that he would allow Summerlin to make any statement that he wished to make, either at the present hearing or on Monday. Subsequently in the hearing, Klink noted that he would rely on the written report of Dr. Tatro attached to the presentence report. The State proceeded by presenting two rebuttal psychiatric witnesses.

Judge Marquardt advised the parties that he would deliberate over the weekend and announce his decision on Monday. Unbeknownst to Summerlin, Judge Marquardt was a heavy user of marijuana at the time, a fact that the State conceded in the federal habeas proceedings before the district court in this case.[1]

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1. During his later disbarment proceedings, Judge Marquardt admitted that he was addicted to the drug, although he did not specify how long he had been addicted. In support of his allegations against Judge Marquardt, Summerlin submitted to the (continued...)

The amount of marijuana that Judge Marquardt may have used during the trial or deliberations is unknown because the district court did not allow discovery on this issue, although there is record support for Summerlin's claim that Judge Marquardt was either having difficulty concentrating or experiencing short-term memory loss.[2]

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1. (...continued)
district court an official report from the Phoenix Police Department dated June 3, 1991. The report details a purchase of marijuana by Judge Marquardt from Barbara Moffett in May of 1991, which was intercepted from the United States mail by the police. When the delivery went awry, the report states that Judge Marquardt called Barbara Moffett to see if she had spoken to the authorities about the purchase, and when she told him she had not, Judge Marquardt told her that everything would "work out okay" because his daughter Tiffany's boyfriend Butch "was going to take the rap for the marijuana." The official police report also states that Barbara Moffett told Phoenix police in 1991 on the basis of first-hand knowledge that Judge Marquardt "was a frequent user of marijuana, had been when she met him [sixteen years earlier], and has continued to be so since." The envelope in which Judge Marquardt sent a cashier's check to Ms. Moffett for the marijuana carried the printed official heading, "Philip Marquardt, Superior Court Judge, Phoenix, Arizona."

In a separate episode, Judge Marquardt was convicted in 1988 in Texas of misdemeanor possession of marijuana which was found on his person at the port of entry in Houston. *In re Marquardt*, 778 P.2d 241, 242-43 (1989). His apparently false explanation documented in that case was that a stranger gave him the marijuana wrapped in a small piece of plastic that he stuck in his watch pocket. *Id.* at 242. For that offense, the Supreme Court of Arizona suspended him from his judicial position without pay for one year from September 2, 1988, through September 2, 1989, a sanction considered by that court to be more severe than a mere censure or reprimand. *Id.* at 250. Despite this serious and career-threatening incident, Judge Marquardt continued to use marijuana. Eventually, Judge Marquardt stepped down from the bench and was ordered disbarred in Arizona and by the United States Supreme Court after the 1991 incident came to light. *See In re Disbarment of Marquardt*, 503 U.S. 902 (1992); *In re Marquardt*, 821 P.2d 161 (Ariz. 1991).

2. There are instances during pre-trial hearings and at trial when Judge Marquardt exhibited confusion over facts that had just been presented to him. He also made some quite perplexing, if not unintelligible, statements at various times during the trial. Obviously, because there was no discovery or evidentiary hearing permitted, the question of whether these episodes were related to impairment was, and is, unresolved.

In any event, Judge Marquardt adjourned the penalty phase proceedings on Friday, indicating that he would deliberate over the sentence during the weekend and would also consider the motion for a new trial. However, on Monday, he either forgot or elected not to rule on the motion for a new trial and immediately proceeded with sentencing. Judge Marquardt began the hearing simply by announcing the case and inquiring whether Summerlin had anything to say or legal cause to show why judgment and sentence should not be pronounced. Klink stated he knew of no legal cause. Summerlin stated that he had a motion to vacate the judgment for the judge to consider. The judge examined the motion, took a five-minute recess, then denied it. The judge then heard brief oral arguments from the State and from Klink. He neither asked Summerlin whether he had anything further to say nor advised him of his right to allocution with respect to the sentence.

Judge Marquardt then sentenced Summerlin to death after finding two aggravating circumstances and no sufficiently substantial mitigating circumstances. The judge based his decision as to aggravating circumstances on two statutory grounds: (1) that the defendant had a prior felony conviction involving the use or threatened use of violence on another person, Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended in 1993); and (2) that Summerlin committed the offense in an especially heinous, cruel, or depraved manner, *id.* § 13-703(F)(6). He found no mitigating circumstances.

The same day, Judge Marquardt also sentenced James Clifford Fisher to death. Fisher had been charged with murdering Marguerite Bailey—no relation to Brenna Bailey—with a blunt instrument. *See State v. Fisher,* 686 P.2d 750, 758 (Ariz. 1984). As in the case with Summerlin, Judge Marquardt found two aggravating circumstances (including that the victim had been killed in an especially heinous and depraved manner) and no mitigating circumstances sufficiently substantial to call for leniency. *Id.* at 775-76. Fisher eventually received post-conviction relief on the basis of an unethical plea agreement that Judge Marquardt expressly entered into as a party and subsequently allowed into evidence at trial. *See State v. Fisher,* 859 P.2d 179, 184

(Ariz. 1993). Summerlin alleges that Judge Marquardt confused some of the facts between the cases during Summerlin's sentencing hearing.

The Supreme Court of Arizona reviewed and affirmed Summerlin's convictions and his sentence. *See State v. Summerlin*, 675 P.2d 686 (Ariz. 1983), *recons. den.* Jan. 17, 1984. After an initial petition for writ of habeas corpus in federal district court and four unsuccessful post-conviction attempts in state court to overturn his conviction, Summerlin filed a second amended petition for writ of habeas corpus in the federal district court in Arizona on November 22, 1995. *See* 28 U.S.C. § 2254 (1994). The federal district court denied Summerlin's second amended petition for writ of habeas corpus on October 31, 1997. Pursuant to Fed. R. Civ. P. 59(e), Summerlin moved to vacate the judgment on November 28, 1997. The district court denied this motion on January 12, 1998. However, the district court issued a certificate of probable cause enabling Summerlin to appeal pursuant to Fed. R. App. P. 22(b)(1). This timely appeal followed.

A divided three-judge panel of this Court issued its opinion on October 12, 2001, affirming the district court in part and reversing in part. *See Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001). The case was remanded for an evidentiary hearing as to whether Judge Marquardt was competent when he was deliberating on whether to impose the death penalty. *Id.* at 957.

In the meantime, the United States Supreme Court granted certiorari in *State v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 534 U.S. 1103 (2002), which involved a potential reexamination of Arizona's death penalty statute in light of the Sixth Amendment. Because this was an issue that had been raised by Summerlin in his state and federal court petitions, the panel withdrew its decision and deferred submission of the case pending the Supreme Court's resolution of *Ring*. *See Summerlin v. Stewart*, 281 F.3d 836, 837 (9th Cir. 2002). Later that year, the Supreme Court issued its decision in *Ring v. Arizona*, holding that Arizona's capital sentencing scheme was incompatible with the Sixth Amendment right to a trial by jury. 536 U.S. at 609.

Following the Supreme Court's *Ring* decision, Summerlin moved to stay the proceedings in this case. Summerlin desired the stay so that he could request that the Arizona Supreme Court recall the mandate in his direct appeal to consider *Ring's* application to his case. Such a procedure is cognizable under Arizona state law. *See Lindus v. N. Ins. Co. of N.Y.*, 438 P.2d 311, 313 (Ariz. 1968) (describing doctrine); *see also State v. Ariz. Dep't of Corrs.*, 928 P.2d 635, 636 (Ariz. 1996) (applying procedure to consider retroactivity of judicial ruling). The panel granted the stay request. Subsequently, the Arizona Supreme Court denied Summerlin's motion to recall the mandate. This decision exhausted all of Summerlin's potential state remedies. *Cf. Wood v. Kemna*, 13 F.3d 1244, 1245-46 (8th Cir. 1994) (noting that habeas petitioners need not ordinarily resort to extraordinary state remedies, such as recall of the mandate, to satisfy federal exhaustion requirements, but holding that exhaustion might be required when there was a real possibility of relief under extraordinary and unique circumstances).

After the Arizona Supreme Court denied Summerlin's motion to recall the mandate, the panel requested a vote of our Court as to whether this case should be reheard *en banc*. Following an affirmative vote of a majority of the non-recused active members of the Court, *see Summerlin v. Stewart*, 310 F.3d 1221 (9th Cir. 2002), the case was reheard *en banc* on December 10, 2002.

We have jurisdiction pursuant to 28 U.S.C. § 2253. The Warden does not contend that Summerlin failed to exhaust his state remedies or that any of his claims are procedurally defaulted. Because this appeal was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal in this case is governed by AEDPA rules. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000). However, because the petition for habeas corpus was filed before AEDPA's effective date, pre-AEDPA law governs the petition itself. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Summerlin argues on appeal that:

1. He did not receive effective assistance of counsel during the guilt phase of his trial in violation of his rights under the Sixth Amendment;

2. The Arizona death penalty statute, as applied to him, is unconstitutional in that it permits a judge rather than a jury to determine the elements necessary for a capital sentence;

3. He did not receive effective assistance of counsel during the sentencing phase of his capital trial in violation of his rights under the Sixth Amendment;

4. His court-appointed public defender had a conflict of interest that adversely affected her representation at a critical stage of the proceedings, in violation of his rights under the Sixth Amendment;

5. He was deprived of his right to due process of law because the trial judge was addicted to marijuana during his trial and deliberated over his sentence while under the influence of marijuana; and

6. Cumulative errors require reversal of his sentence and conviction. Summerlin's only claim specific to the conviction phase alone is his argument that he received ineffective assistance of counsel during his guilt-phase trial. With the exception of his cumulative error contention, the remainder of Summerlin's claims relate to the imposition of the death sentence.[3]

II

Summerlin alleges that he was denied the effective assistance of counsel at the guilt phase of his murder trial in violation of the Sixth Amendment as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984). We review the dismissal of a habeas petition *de novo,* including the mixed questions of law and fact raised by claims alleging ineffective assistance of counsel. *See Williams v. Woodford*, 306 F.3d 665, 684 (9th Cir. 2002); *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995).

To prevail on this claim, Summerlin must demonstrate first that the performance of his counsel fell below an objective standard of reasonableness, and second that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other. *See id.* at 687.

We begin with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and with the acknowledgment that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. However, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

3. Summerlin's claim that his counsel had a conflict of interest does not implicate the guilt phase because his argument is that he was deprived of a favorable sentence. Summerlin's counsel clarified at oral argument that the claim concerning the trial judge's impairment was limited to the judge's penalty phase deliberations.

professional judgments support the limitations on investigation." *Id.* at 690-91.

Summerlin alleges that his trial lawyer failed to investigate and to present his "only viable defense," namely, that Summerlin had an organic brain dysfunction and an "impaired ability to premeditate or to exercise self-control." To analyze this issue properly, we must examine the mental defenses then available under Arizona law. At the time, Arizona had adopted the *M'Naghten* test "as the sole standard for criminal responsibility." *State v. Ramos*, 648 P.2d 119, 121 (Ariz. 1981) (internal quotation marks omitted). To sustain a defense of legal insanity:

> An accused must have had at the time of the commission of the criminal act: (1) Such a defect of reason as not to know the nature and quality of the act, or (2) If he did know, that he did not know he was doing what was wrong.

State v. Christensen, 628 P.2d 580, 583 (Ariz. 1981).

At the time Summerlin was charged, Arizona already had rejected the affirmative defense of diminished capacity. *See State v. Mott*, 931 P.2d 1046, 1051 (Ariz. 1997) ("Because the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent."). Thus, the situation that confronted Klink was unlike that in *Pirtle v. Morgan*, 313 F.3d 1160, 1169-73 (9th Cir. 2002) (holding that counsel had been constitutionally ineffective for not asserting a diminished capacity defense then available under Washington law).

The Arizona Supreme Court also had held, as a matter of law, that criminal defendants could not present psychiatric testimony to negate the element of specific intent. *State v. Laffoon*, 610 P.2d 1045, 1047 (Ariz. 1980). Arizona did allow the introduction of psychiatric evidence as to a defendant's tendency to act on impulse as probative of an absence of premeditation. *Christensen*, 628 P.2d at 582-83. However,

under Arizona law, the standard for establishing premeditation is not high. The prosecution only need show that the defendant "had time to reflect after forming the intent to kill." *Clabourne v. Lewis*, 64 F.3d 1373, 1380 (9th Cir. 1995) (citing *State v. Neal*, 692 P.2d 272, 276 (Ariz. 1984)). "This length of time could have been as instantaneous as it takes to form successive thoughts in the mind, and premeditation may be proven by circumstantial evidence." *Neal*, 692 P.2d at 276 (citing *State v. Lacquey*, 571 P.2d 1027, 1030 (Ariz. 1977)).

Thus, Summerlin's trial counsel faced formidable legal hurdles in presenting a psychiatric defense at the guilt phase. Nonetheless, counsel conducted a substantial amount of investigation into a potential psychiatric defense. Summerlin's first counsel moved for a mental examination under Ariz. R. Crim. P. 11 to determine whether Summerlin was competent to stand trial. Upon examination, Dr. Tuchler concluded that Summerlin, although "functionally mentally retarded," did not have a mental disease or defect. Before she withdrew from the case, Roe thoroughly investigated Dr. Garcia-Bunuel's suspicion of psychomotor epilepsy. She obtained neurological testing and pursued this possible diagnosis with Dr. Bendheim, as revealed in the following letter the doctor sent to Judge Derickson in December 1981:

> We again discussed the possibility of psychomotor epilepsy, especially in view of Dr. Garcia-Bunuel's findings that this man had very vivid olfactory (smell) hallucinations preceding outbursts. I went over this whole situation again and told Miss [Roe] that the neurologists have been unable to find psychomotor epilepsy, although there was some slowing of the wave patterns in the temporal lobes, where psychomotor epileptic attacks usually originate.
>
> While a positive electroencephalogram, which was not obtained here, would make a positive diagnosis, an essentially negative EEG does not entirely rule out the possibility of epileptic-type seizures, and for this reason

> I see absolutely no harm and potentially quite a bit of benefit to place this defendant on antiepileptic, anti-seizure type medication, even though the diagnosis has not been established.

During post-conviction hearings, Roe testified that she met with trial counsel Klink on two or three occasions and spent a number of hours discussing her investigative efforts and the viability of a possible insanity defense. She stated that she discussed this aspect of the case with Klink "at great length," explaining to Klink the examinations and conclusions of all of the examining doctors. Klink testified that, after consulting with Roe, he made a tactical decision not to pursue an insanity defense due to the lack of evidence.

Klink did not follow up on Dr. Garcia-Bunuel's earlier suspicion of psychomotor epilepsy because the doctor had changed his opinion and was out of the country at the time of trial. Instead, Klink made a decision to defend his client by arguing that the facts and circumstances of the prosecution's case did not support a verdict of first-degree murder. Summerlin himself desired this fact-based defense.

In assessing an attorney's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. As the Supreme Court recently reiterated, this evaluation must include "an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct." *Wiggins v. Smith*, ___ U.S. ___, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 466 U.S. at 688).

[1] A review of the record indicates that Klink's trial performance did not fall below the objective standard of reasonableness required under *Strickland*. In deciding whether to pursue evidence of Summerlin's mental state, Klink was entitled to rely on the opinions of the mental health experts who already had examined Summerlin. *See*

Hendricks, 70 F.3d at 1038. At the time, none of the doctors would opine that Summerlin was suffering from a mental disease or defect that would provide a foundation for an insanity defense. None of the physicians, including Dr. Garcia-Bunuel, was able to diagnose Summerlin as clearly suffering from psychomotor epilepsy. It thus was reasonable for Klink not to investigate this possibility further. *Cf. Wiggins*, 123 S. Ct. at 2536-38 (upholding an ineffective assistance claim against counsel who curtailed investigation despite promising leads in preliminary discovery).

Likewise, given the doctors' inability to make a diagnosis, Klink's tactical decision to forgo presenting what little evidence he had of epilepsy was certainly within the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *see also Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion.").

Psychiatric testimony would have been admissible concerning Summerlin's impulsive personality to show absence of premeditation. *See Vickers v. Ricketts*, 798 F.2d 369, 372-73 (9th Cir. 1986). However, under the circumstances of the case, Summerlin has not shown that he was prejudiced by the failure to introduce such testimony. The basis of the State's premeditation theory was not that Summerlin had planned the crime; rather, it was that he formed the required premeditation during the commission of the crime. To prove its point, the State relied on the circumstances surrounding the crime, including the fact that sexual assault occurred prior to the murder and the fact that Summerlin had retrieved a blunt object after the assault to commit the murder.

The State also relied on the uncontroverted evidence as to how the murder was committed, specifically that Bailey had been hit repeatedly and forcefully on each side of her head. As the Supreme Court of Arizona later noted, Summerlin's "excessive and purposeful actions demonstrate more than just a 'reactionary' homicide." *State v. Summerlin*, 675 P.2d at 694. The State underscored this theory with

presentation of graphic photographic evidence of the numerous wounds sustained by Bailey. The State's witness testified that any one of the blows to the victim's head was sufficient to kill the victim, yet numerous, deep lacerations were evident from the photographs.

[2] Klink was not questioned during the post-conviction hearings about his choice not to present psychiatric evidence of impulsiveness, so we do not know whether this decision was strategic. However, after carefully reviewing the record, the district court concluded that there is no reasonable probability the jury would have acquitted Summerlin of first-degree murder had Klink introduced evidence of Summerlin's impulsive personality. The district court therefore concluded that Summerlin could not establish *Strickland* prejudice as to this claim. *See* 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

[3] The district court's assessment was correct. The psychiatric testimony on this point would have been limited to a general description of Summerlin's behavioral tendencies. Given the State's theory, this would have had only marginal probative value in determining whether Summerlin formed premeditation during the commission of the offense. The jury was instructed properly on the State's premeditation theory, which was a correct statement of Arizona law. In this context, and considering the "totality of the evidence," additional psychiatric testimony would not have generated a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 123 S. Ct. at 2543. Thus, Summerlin has not established a "probability sufficient to undermine confidence in the outcome" of the guilt phase of his trial. *Strickland*, 466 U.S. at 694.

III

The first penalty-phase question presented to us is whether the Arizona death penalty statute, as applied to Summerlin, is unconstitutional in that it permits a judge rather than a jury to determine

the elements necessary for a death sentence. The Supreme Court recently has held that Arizona's capital sentencing scheme was incompatible with the Sixth Amendment right to a trial by jury "to the extent that it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The Supreme Court did not decide whether the holding in *Ring* applied to petitioners, such as Summerlin, who raised the constitutional challenge in collateral post-conviction proceedings rather than on direct appeal.

Because the Warden has argued that *Teague v. Lane*, 489 U.S. 288 (1989), bars relief on this issue, we must decide whether *Ring* has retroactive application to cases on federal habeas review. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (holding that the court of appeals erred by not performing a *Teague* analysis when the issue was "properly raised by the state") (citing *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim.") (emphasis in original)).[4]

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4. Some of our sister circuits have addressed the question of whether *Ring* is retroactive as to cases governed by the AEDPA retroactivity rule, 28 U.S.C. § 2244(b)(2)(A). *See Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (holding that *Ring* was not retroactive under AEDPA, but not reaching the question of retroactivity under *Teague*); *see also Whitfield v. Bowersox*, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003) (declining to address whether death sentence contravened *Ring* because Supreme Court had not expressly made *Ring* retroactive under AEDPA); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc) (same), *petition for cert. filed*, No. 02-10093 (Apr. 14, 2003). The question of whether a rule has retroactive application under AEDPA is a different inquiry from the question of whether *Teague* precludes retroactive application of a rule. Most importantly, AEDPA precludes retroactive application of a new rule of constitutional law unless "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A). Because the Supreme Court has not addressed whether *Ring* should be applied retroactively, the analysis of the retroactively of *Ring* under AEPDA and *Teague* is necessarily distinct. As the Eighth Circuit noted in *Moore*, in analyzing whether *Ring* should be applied retroactively in a case governed by AEDPA, "[a]bsent an express pronouncement on retroactivity from the Supreme Court, the rule from *Ring* is not retroactive." 320 F.3d at 771 n. 3. To date, only the Eleventh

(continued...)

In short, now that the Supreme Court has decided that Timothy Ring's capital murder conviction must be vacated because the judge was constitutionally disqualified from deciding whether Ring was eligible for the death penalty, the question is whether others who received the same constitutionally infirm sentence, including those who previously raised the identical issue,[5] are eligible for the same relief or whether they should remain subject to execution.

The question of whether a newly announced constitutional rule will apply retroactively on collateral review is a relatively recent inquiry in American jurisprudence. As Justice Holmes observed at the turn of the century, "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). At common law, the retroactivity question never arose because judges were believed to be discovering rules rather than declaring them. John C. Gray, *The Nature and Sources of the Law* 222 (1st ed. 1909). Even now, a presumption exists that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). As the Supreme Court noted, "'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.' " *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)).

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4. (...continued)
Circuit has addressed the retroactivity of *Ring* under a *Teague* analysis. *See Turner v. Crosby*, ___ F.3d ___, No. 02-14941, 2003 WL 21739734 (11th Cir. July 29, 2003). In *Turner*, the Eleventh Circuit held that the petitioner's claim was procedurally barred, but held in the alternative that *Ring* was a procedural rule that should not be applied retroactively. *Id.* at *30-*37.

5. Most notably, Jeffery Walton, who raised the identical issue a decade ago, *see Walton v. Arizona*, 497 U.S. 639 (1990), but whose claim was rejected by the Supreme Court.

Following the Civil War and enactment of the Fourteenth Amendment, Congress expanded the scope of habeas corpus review to cover challenges brought by those in state custody, *see* Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241(c)(3)), prompting the Supreme Court to determine the proper scope of federal habeas jurisdiction. By 1953, the Supreme Court confirmed the cognizability of all federal constitutional claims filed by state prisoners. *Brown v. Allen*, 344 U.S. 443 (1953). The expanding scope of federal review, coupled with a significant increase in the filing of federal habeas petitions by state prisoners, provided the Supreme Court with the opportunity to review for the first time a number of alleged constitutional deprivations. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 21-22 (1956). Epochal constitutional criminal procedural protections were announced, and in their wake, a novel discussion arose as to whether a new constitutional rule of criminal procedure should be applied retroactively on direct or collateral review. This debate, a "product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field," *Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part), culminated in *Linkletter v. Walker*, 381 U.S. 618 (1965).

In *Linkletter*, a defendant was convicted based on evidence that was obtained during a warrantless search. A year after the defendant had exhausted his state appeals, the Supreme Court decided *Mapp v. Ohio*, 367 U.S. 643 (1961). Subsequently, the defendant filed a habeas petition arguing that *Mapp* required reversal of his conviction. The Supreme Court held that even though "the Constitution neither prohibits nor requires retrospective effect," *Linkletter*, 381 U.S. at 629, a constitutional rule of criminal procedure would not be retroactive unless, under a case-by-case analysis, three factors—the purpose of the new rule, reliance on prior doctrine, and the effect of retroactivity on the administration of justice—favor retroactive application of the rule. *Id.* at 636. The *Linkletter* rule applied to convictions pending on direct review as well as to final convictions challenged collaterally by a federal habeas petition. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966).

The tripartite *Linkletter* test proved difficult to apply. Justice Harlan observed that it had fostered the creation of "an extraordinary collection of rules to govern the application of that principle." *Desist v. United States*, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting). He contended that the test produced inconsistent results, leading to different treatment for similarly-situated defendants. *See id.* Justice Harlan remained critical of the *Linkletter* test throughout a series of subsequent cases. *See, e.g., Mackey*, 401 U.S. at 675 (Harlan, J., concurring in part and dissenting in part); *Coleman v. Alabama*, 399 U.S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef v. New Jersey*, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins v. Delaware*, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting); *Desist*, 394 U.S. at 256 (Harlan, J., dissenting). He argued instead that new constitutional rules ought to apply to all cases that were not final or that were pending on direct review. *Mackey*, 401 U.S. at 678-80. He also contended that new procedural (as opposed to substantive) due process rules ought not to apply retroactively on habeas review unless the claim implicated procedures "implicit in the concept of ordered liberty" or addressed rules that "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.* at 693-94 (internal quotation marks and citations omitted).

The analytical framework propounded by Justice Harlan ultimately proved persuasive. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Supreme Court adopted the first portion of Justice Harlan's analysis, noting that "[i]n Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. The Court therefore held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328.

[4] Two years later, the Court clarified its retroactivity jurisprudence in the habeas context in *Teague*. Importing Justice Harlan's analysis, *Teague* held that "[u]nless they fall within an

exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310.

[5] *Teague* also adopted Justice Harlan's two exceptions, providing that a new rule of criminal procedure would be retroactive if it "place[d] certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe," or if the rule "require[d] the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* at 311 (internal quotation marks omitted). The Supreme Court explained that the second exception had two components, formulated by combining aspects from Justice Harlan's dissents in *Desist* and *Mackey*. The Court thus limited the exception for "watershed rules of criminal procedure" to those procedures that both "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," *id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotation marks omitted; emphasis added in *Teague*), and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313.

[6] Before applying these concepts to the instant case, it is important to set the appropriate analytic framework. The threshold question in a *Teague* analysis is whether the rule the petitioner seeks to apply is a substantive rule or a procedural rule, because "*Teague* by its terms only applies to procedural rules." *Bousley v. United States*, 523 U.S. 614, 620 (1998). If the rule is procedural, the court then conducts a three-step analysis to determine whether *Teague* bars its application. *See O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997). First, the reviewing court "must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Caspari*, 510 U.S. at 390. Second, the court must survey "the legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468 (1993), to determine whether existing precedent compelled a finding that the rule at issue "was required by the Constitution." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (internal quotation marks and citations omitted). If existing precedent already required application of the rule, the *Teague* bar does not apply. If, by contrast, the procedure at issue is considered

a new rule for *Teague* purposes, the court must proceed to the third step and determine whether either of the two announced exceptions applies. *Teague*, 489 U.S. at 307 (plurality). The presumption against retroactivity is overcome only if the new rule prohibits "a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 122 S. Ct. 2242 (2002), or presents a new "watershed rule of criminal procedure" that enhances accuracy and alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction. *Teague*, 489 U.S. at 311 (plurality; citations omitted).

IV

We first consider the threshold *Teague* question, namely whether *Ring* announced a substantive rule or a procedural rule. *See Bousley*, 523 U.S. at 620. Unlike strictly procedural rules, "new rules of substantive criminal law are presumptively retroactive." *See, e.g., Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001) (citing *United States v. Mandanici*, 205 F.3d 519, 525 (2d Cir. 2000)), *cert. denied*, 534 U.S. 1083 (2002). Thus, the *Teague* retroactivity bar does not apply if the rule *Ring* announced is substantive, rather than procedural, in nature. *Bousley*, 523 U.S. at 620.

As *Erie* doctrine demonstrates in the context of civil litigation, the distinction between "substantive" and "procedural" is not always easy to divine. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Hanna v. Plumer*, 380 U.S. 460, 471- 74 (1965); *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). The Supreme Court acknowledged this problem in a pre-*Teague* consideration of the difference between substantive and procedural criminal law, noting that "[w]e would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other." *Robinson*, 409 U.S. at 509.

However difficult it is to locate, though, "[t]his distinction between substance and procedure is an important one in the habeas

context." *Bousley*, 523 U.S. at 620. In giving shape to this important distinction, the Supreme Court has understood decisions of "criminal procedure" to be those decisions that implicate how the criminal trial process functions. Under *Teague*, only those decisions of "procedure" that insert into the criminal trial process a mechanism " 'without [which] the likelihood of an accurate conviction is seriously diminished' " apply retroactively. *Id.* (quoting *Teague*, 489 U.S. at 313).

[7] Decisions of "substantive criminal law," by contrast, are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes. *Id.* (noting that a Supreme Court holding is "substantive" for *Teague* purposes when it impacts the scope and application of a "substantive federal criminal statute"); *see also Davis v. United States*, 417 U.S. 333, 346 (1974) (including within the definition of "substantive" those decisions that remove primary conduct from the purview of criminal punishment). Thus, for *Teague* purposes, a new rule is one of "procedure" if it impacts the operation of the criminal trial process, and a new rule is one of "substance" if it alters the scope or modifies the applicability of a substantive criminal statute. *Bousley*, 523 U.S. at 620.

In *Bousley*, the Supreme Court applied this substantive procedural logic, rejecting the government's *Teague*-based non-retroactivity argument because the case called for a construction of a federal statute. *Teague*, Chief Justice Rehnquist explained, "is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Id.* For the same reason, we recently determined that the rule announced in *Richardson v. United States*, 526 U.S. 813, 815 (1999), requiring jury unanimity on individual violations alleged as part of a continuing criminal enterprise, is substantive, not procedural, under *Teague*. *See United States v.*

Montalvo, 331 F.3d 1052 (9th Cir. 2003). All of our sister circuits that have considered the question agree with this categorization.[6]

"[S]ignificant" to both this court's and our sister circuits' understanding of *Richardson*'s rule as substantive is the fact that *Richardson* "was 'decid[ing] the meaning of a criminal statute.' " *Montalvo*, 331 F.3d at 1056 (citation omitted; alteration in original); *see also Murr*, 200 F.3d at 906. Explaining or redefining elements of an offense, we observed in *Montalvo*, constitutes a decision of substantive criminal law for *Teague* purposes. 331 F.3d at 1055-56; *see also United States v. Dashney*, 52 F.3d 298, 299 (10th Cir. 1995). Thus, because *Richardson* expressly "analyz[ed] what constitutes 'elements' as opposed to brute facts or 'means' " of an offense, the rule *Richardson* announced was substantive for *Teague* purposes. *Montalvo*, 331 F.3d at 1056.[7]

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6. *See, e.g., United States v. Barajas-Dias*, 313 F.3d 1242, 1245 (10th Cir. 2002); *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003); *Santana-Madera*, 260 F.3d at 138-39; *Lopez v. United States*, 248 F.3d 427, 431-32 (5th Cir.), *cert. denied*, 534 U.S. 898 (2001); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr v. United States*, 200 F.3d 895, 905-06 (6th Cir. 2000).

7. In contrast, our opinion in *United States v. Buckland*, 289 F.3d 558 (9th Cir.) (en banc), *cert. denied*, 122 S. Ct. 2314 (2002), illustrates how a decision with some substantive implications may be considered a procedural rule for *Teague* purposes. In *Buckland*, we assessed the impact of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on "type and quantity" findings under 21 U.S.C. § 841(b). 289 F.3d at 562-63. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Rejecting the contention that *Apprendi* rendered § 841 unconstitutional, *id.* at 564, we concluded that *Apprendi* did not alter, restructure, or redefine as a matter of New Jersey law the substantive elements of the underlying offense there at issue, nor did it create or resurrect a separate substantive offense. Further, we noted, *Apprendi* did not demand that we do so when assessing "type and quantity" evidence under § 841. *Id.* at 565, 568. Rather, *Apprendi* imposed a particular procedure through which the existing " 'elements' in § 841[ ]" must be established, viz., through submission to the jury and proof beyond a reasonable doubt. *Id.* Accordingly, we determined in *Buckland* that the impact of *Apprendi* on "type and quantity" under § 841 was one of a

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In the habeas context in particular, as Chief Judge Becker has observed, there are those cases that do "not fall neatly under either the substantive or procedural doctrinal category." *United States v. Woods*, 986 F.2d 669, 677 (3d Cir. 1993). In such cases, "the best approach is to recognize that [the case at issue] is neither entirely substantive nor procedural." *Id.* at 678. *Ring* is such a decision. In one sense, *Ring*—like *Apprendi*—announced a procedural rule: *Ring* mandated that a jury, rather than a judge, must find aggravating circumstances in a capital case. *Ring*'s holding thus addressed, at least in part, the procedure by which any capital trial must be conducted. *See Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (assessing the operation of *Ring* on Oklahoma law).[8]

[8] In the context of substantive Arizona criminal law, however, *Ring* did more than answer a strictly procedural question. Thus, *Ring* is unlike *Apprendi*, in which the Supreme Court expressly declared that its decision had no impact on substantive criminal law, noting that "[t]he substantive basis for New Jersey's enhancement is not at issue." 530 U.S. at 475. By important contrast, the substantive basis for Arizona's capital sentencing scheme was precisely at issue in *Ring*.[9]

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7. (...continued)
procedural—not substantive—ilk. *Id.* at 563 (noting that *Apprendi* was retroactive nevertheless because the case arose through direct review) (citing *Griffith*, 479 U.S. at 328).

8. The Eleventh Circuit did not address the question of whether *Ring* had substantive impact on Florida law in its consideration of whether *Teague* barred the retroactive application of *Ring*. *See Turner*, 2003 WL 2173934, *33-*37. Thus, our consideration in this respect is different from the issue addressed by the Eleventh Circuit. To the extent that the Eleventh Circuit relied on a pure analogy to *Apprendi* in its *Ring* analysis, we respectfully disagree with its conclusions.

9. In its assessment of the "linkage" between *Ring* and *Apprendi*, the dissent contends that we hitch our distinction of *Apprendi* solely to the putative inapplicability of harmless-error analysis in the *Ring* context. However, the crux of the analysis is different. What "distance[s]" *Ring* from *Apprendi* is not simply a harmless error consequence. Rather, the very focus of the Supreme Court's analysis in the two cases proves *Ring* and *Apprendi* distinct: *Apprendi* expressly refused to

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Ring rendered Arizona's substantive capital murder statute unconstitutional. More than a procedural holding, *Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment. That is, as applied to the particular Arizona murder statute at issue here, *Ring*'s holding was "substantive" for *Teague* purposes. *See Bousley*, 523 U.S. at 620 (noting that a Supreme Court holding is "substantive" when it impacts the scope and application of a "substantive federal criminal statute"). A careful analysis of the structure and history of the relevant Arizona statutes, coupled with a close examination of the underlying rationale of *Ring* and the Supreme Court's related jurisprudence, reveals that *Ring* is, as to Arizona, a "substantive" decision, even if its form is partially procedural.

In 1901, the Territory of Arizona enacted its first death penalty statute, leaving capital sentencing to the discretion of the jury except where the defendant entered a plea of guilty. *See* Ariz. Territorial Rev. Stat., tit. 8, § 174 (1901). In relevant part, the 1901 Arizona statute provided that

> [e]very person guilty of murder in the first degree shall suffer death or imprisonment . . . for life, at the discretion of the jury trying the same, or, upon the plea of guilty, the court shall determine the same.

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9. (...continued)
reach "[t]he substantive basis" of law at issue in that case, *see* 530 U.S. at 475; *Ring*, conversely, did reach the relevant substantive basis. *See* 536 U.S. at 589-90. In eliding this aspect of *Ring*'s analysis, the dissent both overstates *Ring*'s affinity to *Apprendi* and mischaracterizes the first step of our "syllogism." *See* Dissent at 12789. The "substantive" aspect of *Ring* rests on more than the creation of a separate substantive offense. It rests, in addition, on the Supreme Court's wholesale invalidation of Arizona's capital sentencing scheme. *See Bousley*, 523 U.S. at 620. This kind of consideration of the "substantive basis" of the law was wholly absent from the Supreme Court's analysis and decision in *Apprendi*.

Id.

In 1916, Arizona abolished the death penalty by state initiative, *see* Act of Dec. 8, 1916, 1917 Ariz. Session Laws, Initiative and Referendum Measures, at 4-5, but the 1901 death penalty statute was restored through similar political means in 1918. *See* Act of Dec. 5, 1918, 1919 Ariz. Sess. Laws, Initiative and Referendum Measures, at 18.

Following the 1918 initiative, Arizona's death penalty scheme remained largely unchanged for more than 50 years. From 1919 until 1972, Arizona committed the decision as to whether to impose the penalty of death following a criminal trial to the complete discretion of the jury. *See Hernandez v. State*, 32 P.2d 18, 20-21 (Ariz. 1934) ("It is clear from this that the question of punishment in first-degree murder cases is wholly within the jury's discretion and that the court has no duty in connection therewith other than to advise it that it must determine which of the penalties—death or life imprisonment—shall be imposed upon the defendant if it finds him guilty of that offense.").

In 1972, however, the Supreme Court held that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The impact of *Furman* particularly is instructive in this context. There was no doubt, importantly, that *Furman* had retroactive effect. *See Moore v. Illinois*, 408 U.S. 786, 800 (1972) (applying *Furman* on habeas review); *United States v. Johnson*, 457 U.S. 537, 550 (1982) (discussing same). Following the dictates of *Furman* and *Stewart v. Massachusetts*, 408 U.S. 845 (1972), the Supreme Court vacated a number of Arizona death sentences, both on direct appeal and on collateral habeas review. *See, e.g., Alford v. Eyman*, 408 U.S. 939 (1972) (habeas); *Kruchten v. Eyman*, 408 U.S. 934 (1972) (habeas); *Sims v. Eyman*, 408 U.S. 934 (1972) (habeas); *Gause v. Arizona*, 409 U.S. 815 (1972) (direct review). In light of this Supreme Court precedent, the Arizona Supreme Court declared the Arizona death penalty statute to be unconstitutional under the Eighth and Fourteenth Amendments. *See State v. Endreson*, 506 P.2d 248, 254

(Ariz. 1973). The Arizona court acknowledged, after examining the structure of the relevant Arizona criminal statutes, that the Supreme Court, through *Furman*, had "abolished 'capital offenses' in Arizona" substantively. *In re Tarr*, 508 P.2d 728, 729 (Ariz. 1973). In short, the effect of *Furman* in declaring Arizona's capital murder statute unconstitutional was unquestionably substantive.

A year later, in 1973, Arizona enacted a new "capital offense" statute. This new statute established sentencing standards in capital cases and provided for sentencing by judge, rather than by jury. *See* Act of May 14, 1973, ch. 138, § 5, 1973 Ariz. Sess. Laws 966, 968-70. The 1973 statute identified six aggravating circumstances and four mitigating circumstances for sentencing courts to consider and required the court to impose a death sentence only if it found (1) one or more aggravating circumstances to exist and (2) no countervailing mitigating circumstances "sufficiently substantial to call for leniency." *Id.* In *State v. Richmond*, 560 P.2d 41 (Ariz. 1976), the Arizona Supreme Court upheld the constitutionality of the 1973 death penalty statute.

But the Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978), which declared unconstitutional death penalty statutes that restricted the right of the defendant to show mitigating circumstances in capital cases raised anew questions of whether the 1973 Arizona statute could pass constitutional muster. To this end, in *Bishop v. Arizona*, 439 U.S. 810 (1978), the Supreme Court vacated and remanded an Arizona death sentence for reconsideration in light of *Lockett*. Following this remand, the Arizona Supreme Court held that Arizona's 1973 death penalty statute was unconstitutional insofar as it precluded the defendant from proving non-statutory mitigating circumstances. *State v. Watson*, 586 P.2d 1253, 1257 (Ariz. 1978).

Soon thereafter, in 1979, the Arizona legislature amended the State's death penalty statute to conform to *Lockett* by defining as relevant mitigating circumstances "any factors offered by the state or the defendant which are relevant in determining whether to impose a sentence less than death." These factors included, but were not limited

to, the factors enumerated in the statute itself. Act of May 1, 1979, ch. 144, § 1, 1979 Ariz. Sess. Laws 449, at 450-51. The legislature added various aggravating and mitigating factors to the terms of the statute in 1977, 1978, 1984, and 1985, but, during this period, the essential structure of Arizona's death penalty statute remained the same. In 1983, the United States Supreme Court confirmed that, to be constitutional under the Eighth Amendment, a state's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Finding at least one aggravating factor "narrows the class of persons eligible for the death penalty." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Arizona's substantive revisions to its capital murder statute were designed to pass these constitutional requirements. Thus, as a result of *Furman* and its progeny, the crime of capital murder in Arizona was substantively altered. As Justice Thomas has observed: "[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes." *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring).

In 1988, we considered a defendant's Sixth Amendment challenge to the Arizona death penalty statute. *See Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc). In *Adamson*, we noted that, "[u]nder Arizona's revised code, all murder is not capital murder," *id.* at 1025, and that, under the code, Arizona had in effect defined capital murder to be a substantive offense separate from non-capital murder. *Id.* at 1026; *see id.* at 1025 ("[W]e recognize that the mere use of labels . . . to compartmentalize the functions of judge and jury[ ] does not negate the very real possibility that what are called 'sentencing' decisions may in fact usurp jury factfinding responsibilities."). We concluded in *Adamson* that, because the Arizona statute required the finding of aggravating factors before the death penalty could be imposed, the Arizona statute made these aggravating factors elements of the "distinctive offense of *capital* murder," not mere sentencing factors relevant to increasing the punishment for a lesser offense. *Id.* at

1026-27 (emphasis in original). Accordingly, we held that "Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury's determination." *Id.* at 1027. Based on this understanding of Arizona law, we found Arizona's identification and treatment of the "elements of the crime of capital murder as sentencing factors for determination by a judge," rather than as offense elements to be determined by the jury, to be "impermissibl[e]" and "in violation of the Sixth Amendment." *Id.* at 1029.

In *Walton*, the Supreme Court abrogated our decision in *Adamson*. In pertinent part, *Walton* held that aggravating circumstances under Arizona law were only "sentencing considerations," not "elements of the offense" of capital murder. *Id.* at 648 (citing *Poland v. Arizona*, 476 U.S. 147, 156 (1986)). *But cf. id.* at 710-14 (Stevens, J., dissenting) (suggesting that, "under Arizona law," the aggravating factors are "elements of a capital crime [ ] [that] must be determined by a jury") (citations omitted). Thus, *Walton* refuted our decision in *Adamson* and concluded "that the Arizona capital sentencing scheme does not violate the Sixth Amendment." *Id.* at 649.

Ring expressly overruled *Walton* in relevant part. 536 U.S. at 589. In considering the same statutory scheme at issue in *Walton* and *Adamson*, *Ring* squarely rejected *Walton*'s interpretation of Arizona law, holding that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.' " *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

In so doing, *Ring* restored, as a matter of substantive law, the pre-*Walton* structure of capital murder law in Arizona; and, in so doing, *Ring* confirmed what we stated in *Adamson*: Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense. 865 F.2d at 1025-28; *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 739 (2003) ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes

an element, and must be found by a jury beyond a reasonable doubt.") (opinion of Scalia, J.). That is, when *Ring* displaced *Walton*, the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder, as Arizona defined it, unconstitutional. And when *Ring* overruled *Walton*, repositioning Arizona's aggravating factors as elements of the separate offense of capital murder and reshaping the structure of Arizona murder law, it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally. *Cf. Jones v. United States*, 526 U.S. 227, 229 (1999) (holding that the federal carjacking statute established three separate offenses rather than a single crime with a choice of three maximum penalties). In response to *Ring*, the Arizona Supreme Court vacated all death sentences in cases pending on direct appeal, *see State v. Smith*, 50 P.3d 825, 831 (Ariz. 2002), and the Arizona legislature once more changed the substantive law pertaining to capital punishment—this time providing for jury sentencing in capital cases. *See* Act of Apr. 27, 2001, ch. 260, § 1, 2001 Ariz. Sess. Laws 1334, 1334.

Ring's understanding of capital murder as an offense both greater than and distinct from other murder crimes is neither unusual among the various States nor unrecognized by the Supreme Court. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 307 n.1 (2002) (noting that the two defendants were both "indicted for capital murder" but "[t]he prosecution ultimately permitted [one] to plead guilty to first-degree murder in exchange for [ ] testimony against" the other); *Beck v. Alabama*, 447 U.S. 625, 628 (1980) (noting that Alabama law treats "[f]elony murder [as] [ ] a lesser included offense of the capital crime of robbery-intentional killing").

In assessing the operation of *Apprendi*, in fact, Justice Scalia recently explained that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' " *Sattazahn*, 123 S. Ct. at 739. Noting that there was "no principled reason to distinguish . . . what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double

Jeopardy Clause," Justice Scalia concluded "that 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*." *Id.* at 739-40 (also citing *Ring* for the proposition that "'first-degree murder' . . . is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s)' "); *see also Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime . . . . The aggravating fact is an element of the aggravated crime.").

Ring compelled Arizona to reorder its substantive murder law in order to recognize this two-offense structure. With regard to Arizona murder law, then, *Ring* did more than announce a procedural rule vis-a-vis whether a judge or a jury is to decide if elements of a particular offense have been proven satisfactorily. *Ring* reintroduced "capital murder" as a separate substantive offense under Arizona law, redefining, in the process, what the substantive elements of this "separate offense" of capital murder are. *See Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting) (observing that the Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense" and only to the extent it explicitly cross-references the separate Arizona statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty). In this sense, *Ring* had an inescapably substantive impact in Arizona for *Teague* purposes.[10]

[9] To be sure, states must ensure that their capital sentencing schemes comply with the minimal procedural requirements set forth in *Ring*. Still, in the context of Arizona capital murder law, *Ring*'s rule is not limited to procedure. *Ring* did, as to Arizona, announce a

10. Justice O'Connor recognized this in her dissent in *Ring*, noting that "[t]he Court effectively declares five States' capital sentencing schemes unconstitutional." *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting) (referencing Arizona, Idaho, Montana, Colorado, and Nebraska).

substantive rule: It "decide[d] the meaning of a criminal statute," *see Bousley*, 523 U.S. at 620, and it did so in a manner that both redefined the separate substantive offense of "capital murder" in Arizona and reinserted the distinction between murder and capital murder into Arizona's substantive criminal law structure. Under the Supreme Court's articulation of "substantive" decisions in *Bousley*, then, *Ring* announced a "substantive" rule, *Bousley*, 523 U.S. at 620, for it "altered the meaning of [Arizona's] substantive criminal law." *Santana-Madera*, 260 F.3d at 139; *cf. Cannon*, 297 F.3d at 994 (holding *Ring's* rule to be procedural in a different capital murder context). When a decision affects the substantive elements of an offense, or how an offense is defined, it is necessarily a decision of substantive law. *Dashney*, 52 F.3d at 299. And because *Ring* is a "substantive" decision with regard to the meaning, structure, and ambit of the relevant provisions of Arizona's criminal law, *Teague* does not bar retroactive application of *Ring* to cases decided under those Arizona provisions, regardless of whether those cases are considered on direct or collateral review.

The Arizona Supreme Court considered this question in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and concluded that *Ring* was not a substantive decision. *Id.* at 833. More recently, the Arizona Supreme Court considered related issues in *State v. Ring*, 65 P.3d 915 (Ariz. 2003) ("*Ring II*"). In each case, the Arizona Supreme Court's conclusion was founded on an interpretation of federal law, namely a construction of *Teague* and *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), in *Towery* and an analysis of the Ex Post Facto Clause in *Ring II*. Because the decisions in *Towery* and *Ring II* rest on federal law, and not state law, they do not bind us. *Moore v. Sims*, 442 U.S. 415, 428 (1979) (reiterating the familiar maxim that state courts possess final interpretive "authority" only regarding "laws of the state") (citing *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941), and *Gilchrist v. Interborough Co.*, 279 U.S. 159 (1929)); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954) (noting that a federal court "decide[s] for itself facts or constructions upon which federal constitutional issues rest"); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917) (noting that federal courts determine federal questions independently); *see also Haynes v. Washington*, 373 U.S. 503, 515-16

(1963); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984); *Calkins v. Graham*, 667 F.2d 1292, 1295 n.1 (9th Cir. 1982). This is particularly true in the Eighth Amendment context. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Nonetheless, the two opinions are worthy of analysis.

In *Towery*, the Arizona Supreme Court correctly concluded that *Ring*'s rule is partially procedural under *Teague*. For the reasons previously stated, however, we respectfully disagree with *Towery*'s conclusion that *Ring*'s rule is entirely procedural. *Ring*'s invalidation of Arizona's capital murder statute under the United States Constitution did more than alter "who decides." *Towery*, 64 P.3d at 833. It restructured Arizona law and it redefined, as a substantive matter, how that law operates. It is, thus, incorrect to conclude that the repositioning of aggravating factors as elements of a separate offense did not constitute a "substantive" rule. Such a construction ignores that *Ring*'s restructuring of the elements of the separate offense of capital murder is, at the very least, a determination of the "meaning of a criminal statute," which is precisely the kind of decision that *Towery* itself recognizes as "substantive." *Id.* at 832. Of equal importance is the fact that *Ring*'s revival of the pre-*Walton* two-offense structure of Arizona murder law does "address the criminal significance of certain facts," another kind of decision that *Towery* recognizes as "substantive." *Id.*

The Arizona Supreme Court's analogy to *Apprendi* in *Towery* is flawed as well. As noted above, in *Apprendi*, "[t]he substantive basis for New Jersey's enhancement [was] not at issue." 530 U.S. at 475. In *Ring*, conversely, the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona. As we held in *Adamson*, this regime had defined capital murder as a substantive offense separate from non-capital murder. 865 F.2d at 1026. This distinction was required to satisfy the Eighth Amendment's requirement that a capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877. *Ring* further required the Arizona legislature to amend the Arizona murder statute to conform to the requirements of the United States Constitution.

The Arizona Supreme Court's Ex Post Facto analysis in *Ring II* likewise does not alter our analysis. In *Ring II*, the Arizona Supreme Court concluded that applying Arizona's new sentencing statutes to previously convicted defendants did not violate the federal or state prohibitions against Ex Post Facto application of laws. *Ring II*, 65 P.3d at 928. To reach this conclusion, *Ring II* relied on three decisions: the Supreme Court's decisions in *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Collins v. Youngblood*, 497 U.S. 37 (1990), and the Arizona Supreme Court's decision in *State v. Correll*, 715 P.2d 721 (Ariz. 1986), *rev'd in part on other grounds by Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). *Ring II*, 65 P.3d at 926-28. Like *Dobbert*, *Ring II* concluded, "the statutory change between the two sentencing methods was 'clearly procedural' " in that this legislative enactment merely addressed the "who decides" question. *Id.* at 927 (quoting *Dobbert*, 432 U.S. at 293-94).

In contrast to the post-*Ring* legislative changes at issue in *Ring II*, the Supreme Court's *Ring* decision itself was not merely procedural. *Ring* declared a portion of Arizona's prior law unconstitutional, demanded a redefinition of the meaning of that criminal statute, and prompted the legislative response at issue in *Ring II*, not by announcing a purely procedural rule, but by announcing, as a matter of substantive law, that Arizona's understanding and treatment of the separate crime of capital murder was unconstitutional. This is exactly the kind of decision that is "substantive" under *Bousley*, 523 U.S. at 620. Indeed, the very case law on which *Ring II* relies understands precisely this kind of rule to be of a "substantive nature." *See Collins*, 497 U.S. at 51 (noting that a rule is substantive in the Ex Post Facto context where it implicates "the definition of crimes, defenses, or punishments"); *Correll*, 715 P.2d at 735 (holding that changes relating to aggravating circumstances constituted substantive changes to the offense of capital murder).

Teague requires a different analytical lens from the one used by the Arizona Supreme Court in *Ring II*. We do not necessarily assess whether the action of the Arizona legislature, in response to *Ring*, effected a "substantive" change to Arizona law; rather, we examine whether the rule announced by the Supreme Court in *Ring* was a "substantive" one for *Teague* purposes. Analyzed under *Teague*, the rule announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a "substantive" rule. *See Bousley*, 523 U.S. at 620. Thus, *Teague* does not bar its application in this case.

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V

[10] In addition to *Ring*'s substantive effect on Arizona law, a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review.

A

[11] In undertaking a *Teague* procedural analysis, we first must ascertain the date that Summerlin's conviction became final. *Caspari*, 510 U.S. at 390. Here, the Arizona Supreme Court denied rehearing of its opinion affirming his conviction and death sentence in 1984, *see State v. Summerlin*, 675 P.2d at 686, and Summerlin did not file a petition for a writ of certiorari with the Supreme Court. The relevant date thus is 1984. *See Lambrix*, 520 U.S. at 527 (noting that the defendant's conviction became final when his time for filing a petition for a writ of certiorari expired).

Next, we "survey the legal landscape" as it existed in 1984 to determine whether the result in *Ring* was dictated by then existing precedent. *Graham*, 506 U.S. at 468. Such examination is not limited to Supreme Court decisions. *Williams v. Taylor*, 529 U.S. 362, 381 (2000). Summerlin's conviction became final before the Supreme Court

had decided *Ring*, which overturned *Walton*, which in turn abrogated our decision in *Adamson*.

Summerlin contends that *Ring* does not announce a new rule because *Adamson* had found that Arizona's sentencing scheme denied defendants the "right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments." 865 F.2d at 1023. Regardless of the merits of such argument for convictions made final in 1988, the operative time period is 1984. At that time, Summerlin in fact raised this exact challenge to the Arizona Supreme Court, which soundly rejected it. *State v. Summerlin*, 675 P.2d at 695. The state supreme court reasoned that *Proffitt v. Florida*, 428 U.S. 242 (1976), foreclosed such a challenge for two reasons. First, *Proffitt* found that jury sentencing in the capital context never has been held to be "constitutionally required," and second, the United States Supreme Court speculated that judicial sentencing "should lead, if anything, to even greater consistency" in capital punishment. *State v. Summerlin*, 675 P.2d at 695 (quoting *Proffitt*, 428 U.S. at 252) (internal quotation marks omitted).

[12] "[T]he *Teague* doctrine 'validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.' " *O'Dell*, 521 U.S. at 156 (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)). Further, "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision," *Graham*, 506 U.S. at 467, which *Ring* indisputably did. *Ring*, 536 U.S. at 608-609.

[13] We therefore cannot say that a state court in 1984 "would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 521 U.S. at 156. Summerlin's argument fails because there is no doubt that *Ring* announced a new rule as that term is construed for *Teague* purposes. We must then proceed to the third stage of analysis, namely whether either of *Teague*'s two exceptions apply.

B

[14] The first *Teague* exception examines whether certain primary conduct has been decriminalized or whether certain classes of individuals are immunized from specified forms of punishment by the newly announced rule. *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (permitting retroactive application of a new rule "if the rule places a class of private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution") (internal citations, quotation marks, and modifications omitted). Because *Ring* did not "decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons," *Graham*, 506 U.S. at 477 (quoting *Saffle*, 494 U.S. at 495), the first exception is inapplicable to the instant ruling.

C

To fall within the second *Teague* exception, a new rule must: (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

1

In considering *Ring's* effect on the accuracy of the proceeding, it is important to note that this is a capital case. "Where the State imposes the death penalty for a particular crime, . . . the Eighth Amendment imposes special limitations on that process." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). Under *Teague*, the focus on the "accuracy of the . . . proceeding" generally is understood to mean "accurac[y] [in] determin[ing] . . . innocence or guilt." *Graham*, 506 U.S. at 478 (internal quotation marks omitted). However, as the United States Supreme Court has stated, penalty-phase proceedings also "'have the hallmarks of the trial on guilt or innocence.'" *Sattazahn*, 123 S. Ct. at 737 (quoting *Bullington v. Missouri*, 451 U.S. 430, 439 (1981)). For this reason, a verdict rejecting the imposition of the death penalty prohibits a subsequent capital prosecution. *See id.; Bullington*,

415 U.S. at 439. This is consistent with the substantive consideration of capital murder as a crime distinct from ordinary murder. *Sattazahn*, 123 S. Ct. at 739. Accordingly, in the capital context, *Teague*'s reference to "accuracy in the proceedings" contemplates the ultimate verdict in both the conviction and penalty phases.

[15] The Supreme Court has long recognized that, in the capital context, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).[11] Indeed, as Justice Kennedy has observed, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense." *Sawyer*, 497 U.S. at 243. Reformation of capital sentencing procedures has been presumed to meet the first requirement that the new rule substantially enhance the accuracy of the legal proceeding at issue. *See id.* (but emphasizing that the second "bedrock procedural element" requirement also must be met). Thus, on its face, the procedure at issue in *Ring* is sufficient to meet the first component of *Teague's* second exception. Moreover, upon close examination, the actual impact of procedural change dictated by *Ring* provides further support for finding that the *Ring* rule enhances the accuracy of the determination of capital murder in Arizona.

The Supreme Court recently observed that, in light of the past thirty years of actual experience, "the superiority of judicial factfinding in capital cases is far from evident." *Ring*, 536 U.S. at 607. An examination of the procedure at issue makes apparent several reasons why fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings in Arizona.

First, Arizona penalty-phase presentations to judges bear much greater resemblance to traditional non-capital sentencing hearings than to proceedings required to " 'have the hallmarks of the trial on guilt or

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11. This concern is not merely theoretical. *See* James S. Liebman, et al., *Broken System: Error Rates in Capital Cases, 1973-1995* at 5 (2000) *available at* <http://justice.policy.net/jpreport/>.

innocence.' " *Sattazahn*, 123 S. Ct. at 737 (quoting *Bullington*, 451 U.S. at 439). Penalty phases in jury trials are characterized by the orderly presentation of evidence and argument. In contrast, penalty-phase presentations to Arizona judges are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda, and with formal court proceedings frequently limited to a brief argument by counsel. Whether this has been the product of the participants treating penalty-phase trials as mere sentencing hearings, or whether this is the natural product of the shorthand communication typical of non-capital sentencing proceedings is unknown. However, the results are clear. A quick survey of recent Ninth Circuit cases from Arizona illustrates the point. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 988 (9th Cir. 2002) (no mitigating evidence presented), *petition for cert. filed*, No. 02-1611, 71 U.S.L.W. 3530 (Jan. 23, 2003); *Lambright v. Stewart*, 241 F.3d 1201, 1202-03 (9th Cir. 2001) (no argument presented, and mitigating evidence consumed three transcript pages), *cert. denied*, 534 U.S. 1118 (2002); *Smith v. Stewart*, 189 F.3d 1004, 1010 (9th Cir. 1999) (attorney asked court for advice on what legal and evidentiary considerations could be relevant in establishing mitigation; only brief argument on day of sentencing); *Correll v. Stewart*, 137 F.3d 1404, 1410 (9th Cir. 1998) (no defense witnesses presented; only brief argument); *Clabourne*, 64 F.3d at 1384 (no witnesses presented; only one mitigating circumstance argued)

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In addition, because penalty-phase presentations to judges tend to resemble non-capital sentencing proceedings, the sentencing judge receives an inordinate amount of inadmissible evidence, which he or she is expected to ignore. Indeed, the focus of penalty-phase proceedings before judges has been the presentence report prepared by the probation officer, rather than evidence formally presented and tested at trial.[12] Although presentence reports are an extremely useful

12. The capital murder statute effective at the time contemplated the consideration of presentence reports by capital sentencing judges. Ariz. Rev. Stat. § 13-703(C) (1998) (repealed Laws 1999, Ch. 104, § 1). Consideration of presentence reports was routine. *See, e.g., State v. Bocharski*, 22 P.3d 43, 56 (Ariz. 2001); *State* (continued...)

sentencing tool, by their nature the information they contain is "generally hearsay, even remote hearsay at the second and third remove." *United States v. Frushon*, 10 F.3d 663, 666 (9th Cir. 1993) (quoting *United States v. Fine*, 975 F.2d 596, 603 (9th Cir. 1992)). As a result, presentence reports are generally inadmissible at trial to prove any of the hearsay reports they contain. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 767 (9th Cir. 1995), *as amended by* 98 F.3d 1100 (9th Cir. 1996). Because they are not subject to evidentiary standards, presentence reports may also contain factual errors.[13] In Arizona capital cases, presentence reports have also frequently contained inadmissible victim impact statements, including sentencing recommendations from the victim's family.[14]

In addition, capital sentencing judges in Arizona have often received letters directly from the victim's family and friends expressing

12. (...continued)
v. Mann, 934 P.2d 784, 792 (Ariz. 1997); *State v. Kemp*, 912 P.2d 1281, 1295 (Ariz. 1996); *State v. Gulbrandson*, 906 P.2d 579, 599 (1995); *State v. Stokley*, 898 P.2d 454, 468 (Ariz. 1995); *State v. Brewer*, 826 P.2d 783, 801 (Ariz. 1992); *see also infra* note 12.

13. During the period relevant to this case, a study commissioned by the Federal Judicial Center noted that "[t]he principal problem inherent in the use of the presentence report is its potential for introducing inaccurate or misleading information into the sentencing decision." Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1628 (1980). The study cited an Arizona state case as a primary example in which an inaccurate presentence report caused "defendants [to be] incarcerated for a significantly longer period than they should have been because of untrue statements in the presentence report." *Id.* at 1628-29 (citing *State v. Killian*, 370 P.2d 287, 290 (Ariz. 1962)).

14. *See, e.g., State v. Sansing*, 26 P.3d 1118, 1129 (Ariz. 2001), *cert. granted and judgment vacated by Sansing v. Arizona*, 536 U.S. 954 (2002); *Bocharski*, 22 P.3d at 56; *State v. Soto-Fong*, 928 P.2d 610, 633 (Ariz. 1996); *State v. Spears*, 908 P.2d 1062, 1077 (Ariz. 1996); *Gulbrandson*, 906 P.2d at 599; *State v. Williams*, 904 P.2d 437, 454 (Ariz. 1995); *State v. Bolton*, 896 P.2d 830 (Ariz. 1995); *State v. Apelt*, 861 P.2d 634, 644 (Ariz. 1993); *Brewer*, 826 P.2d at 800; *State v. Greenway*, 823 P.2d 22, 29 (Ariz. 1992); *State v. Amaya-Ruiz*, 800 P.2d 1260, 1287 (Ariz. 1990).

their opinions about sentencing, prompting the Arizona Supreme Court to explain that: "[w]e have no way of preventing members of the community from writing judges." *Mann*, 934 P.2d at 792.[15] The net result, prior to *Ring*, was a capital sentencing system that allowed a large amount of inadmissible evidence to be submitted to capital sentencing judges that could not be considered by a penalty-phase jury.

The penalty-phase presentation in the instant case was typical of pre-*Ring* Arizona capital sentencing cases and illustrates both problems. The actual penalty-phase proceeding was exceedingly truncated and bore more resemblance to traditional non-capital judge sentencing than a trial. Before hearing any presentation by the parties, Judge Marquardt received a presentence report prepared by a probation officer who did not testify during the penalty phase. It contained numerous sentencing recommendations from the victim's family and friends, police officers, and others. Attached to the presentence report were a large number of letters from members of the community expressing their opinions, including a petition with over 500 signatories. The presentence report also contained the probation

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15. Of course, the proper admission of victim impact evidence by itself does not necessarily violate the Eighth Amendment. *Payne*, 501 U.S. at 827. However, the Supreme Court has held that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* at 830 n.2 (citing *Booth v. Maryland*, 482 U.S. 496 (1987)). In addition, if the material "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). The Arizona Supreme Court has acknowledged that a defendant's constitutional rights would be violated if a capital sentencing jury received sentencing recommendations from the victim's family and friends, but has allowed capital sentencing judges to receive the information on the basis that judges will disregard "the irrelevant, inflammatory, and emotional factors." *Bolton*, 896 P.2d at 856.

officer's opinion as to the heinous nature of the crime and expressed her opinion as to the sentence that the judge should impose.

In contrast, the formal presentations by the parties were extremely abbreviated. The admissible evidence actually presented to the judge paled in comparison with the inadmissible material contained in the presentence report. The State submitted a four-page sentencing memorandum urging imposition of the death penalty. Summerlin's attorney submitted nothing. Neither side made an opening statement. The State's formal evidentiary presentation on aggravation consisted of less than one transcript page. Summerlin's counsel declined to introduce testimony as to mitigation; rather, he asked the judge only to review the material contained in the presentence report. Thus, the cumulative presentation of each side's case in chief resulted in less than one page of trial transcript. The only live testimony was a brief presentation by the State to rebut medical statements contained in the presentence report. When viewed by volume, well over ninety percent of the material received by the sentencing judge in this case could not have been presented to a capital sentencing jury. Such a proceeding is not one that bears "the hallmarks of a trial on guilt or innocence."

The point of this discussion is not to examine whether trial errors occurred in any particular case, including this one, but to analyze whether requiring a jury to make the relevant findings would reduce the risk of an erroneous decision. A review of the cases demonstrates that judge capital sentencing proceedings have been contaminated by a large volume of inadmissible evidence and marked by truncated presentations by the parties. We have presumed that the sentencing judge could sort out the truly relevant, admissible evidence from this morass. The relevant question is not whether judges have been able to do so, but whether subjecting penalty-phase evidence to the crucible of a formal trial by jury would reduce the risk of error.

There is little doubt that it would. As Harry Kalven, Jr. and Hans Zeisel described it in their seminal study on the jury system:

> In addition to his wide experience with the likelihood that the defendant before him is guilty, the judge is exposed to prejudicial information which the law, in its regard for the right of the defendant, aims to screen out of the evaluation of his guilt or innocence. The law's ideal in this situation may be something of a libertarian luxury. Our only point is that the law cannot easily achieve it without a jury.

Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 127 (Little, Brown 1966).

If there is any place in which adherence to evidentiary rules, constitutional restraints, and the defendant's confrontation rights is paramount, it must be when the defendant is exposed to the penalty of death. Subjecting penalty-phase presentations to the rigors and restrictions of a jury trial necessarily will improve the quality of presentation and diminish the risk of an erroneous verdict.

A second primary accuracy-enhancing role of a jury in capital cases is to make the important moral decisions inherent in rendering a capital verdict. The Supreme Court "has emphasized that a sentence of death must reflect an ethical judgment about the 'moral guilt' of the defendant." *Schiro v. Indiana,* 475 U.S. 1036, 1038 (1986) (Marshall, J., dissenting from the denial of certiorari) (citing *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982)). One of the critical functions of a jury in a capital case is to "maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois,* 391 U.S. 510, 520 n.15 (1968). Thus, "in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)).

" '[T]he men and women of the jury may be regarded as a microcosm of the community.' " *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting) (quoting *Royal Commission on Capital*

Punishment 1949-1953, Report 200 (1953)). There could "therefore be no more appropriate body to decide whether the fellow-citizen whom they have found guilty of murder should suffer the penalty of death prescribed by the law or should receive a lesser punishment." *Id.* Thus, as Justice Breyer noted in his concurring opinion in *Ring,* entrusting a jury with the authority to impose a capital verdict is an important procedural safeguard, because the jury members "are more attuned to the community's moral sensibility," "reflect more accurately the composition and experiences of the community as a whole," and act to "express the conscience of the community on the ultimate question of life or death." 536 U.S. at 615-16 (Breyer, J., concurring in the judgment) (internal citations and quotation marks omitted).[16]

This principle is not only true as a general matter in capital murder verdicts, but it has specific application to determination of some of the aggravating factors contained in Arizona's death penalty scheme. For example, one of the two aggravating circumstances found by Judge Marquardt in this case was that the murder was committed "in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. § 13-703(F)(6). The Arizona Supreme Court has noted that these are "admittedly broad subjective terms." *State v. Vickers*, 768 P.2d 1177, 1188 n.2 (Ariz. 1989). The assessment of whether a crime is "heinous" depends on the "mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler*, 659 P.2d 1, 10 (Ariz. 1983) (citations omitted). As we noted in discussing this aggravating factor in *Adamson*: "These assessments directly measure a defendant's 'moral

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16. The dissent assails the use of juries in capital sentencing. This criticism misses the central issue. The presence of some imperfections in jury sentencing does not affect the conclusion that juries are ultimately more accurate than judges. While individual jurors may hold emotional or legally inaccurate views, the requirement of unanimity across twelve individuals significantly reduces the chance that these views will hold sway. Moreover, the fact that some jurors feel sympathy or pity does not imply that the verdict is ultimately governed by these emotions. *See, e.g.*, Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 65 (2000) (noting the lack of correlation between feelings of sympathy or pity and a juror's final vote).

guilt' and overall culpability—traditionally the jury's domain of decision." 865 F.2d at 1027.

These assessments may be influenced by the possible acclimation of the judge to the capital sentencing process. Most jurors in capital cases will never sit on another case in which the death penalty is sought. Judges, by contrast, confront death penalty cases on a regular and sometimes routine basis in Arizona. For instance, Judge Marquardt, who sentenced Summerlin to death, imposed capital punishment on James Fisher in a separate case on the same day. A reasonable inference from the habituation brought about by imposing capital punishment under near rote conditions is that a judge may be less likely to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence. Indeed, when questioned about another capital case in which his judgment was being assailed because he purportedly slept through portions of the short penalty-phase hearing, Judge Marquardt answered that he was unable to recall the case, but "said he had no doubt that the death penalty was warranted." Adam Liptak, *Judge's Drug Use at Issue in 2 Death Sentences*, N.Y. TIMES, May 16, 2002, at A1. "These guys have sentenced themselves," he is reported to have said. *Id.*

Of course, Judge Marquardt's conduct is not at all representative of the Arizona judiciary—a point that must be underscored. However, the extremity of his actions highlights the potential risk of accuracy loss when a capital decision is reposed in a single decision-maker who may be habituated to the process, or who may not treat capital sentencing in accordance with the heightened requirements that the Eighth Amendment imposes. Obviously, in Summerlin's case, the concern is not merely theoretical.

In addition, unlike judges, juries do not stand for election in Arizona and therefore are less apt to be influenced by external considerations when making their decisions. As Justice Stevens has commented, "given the political pressures they face, judges are far more likely than juries to impose the death penalty." *Harris*, 513 U.S. at 521 (Stevens, J., dissenting). This postulate has empirical support: Judges

who face election are far more likely to impose the death penalty than either juries or appointed judges. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995) (discussing studies documenting the existence of a statistically-significant correlation between an increased override of juries' recommendations against the death penalty by state judges and occurrence of judicial elections in Alabama, Florida, and Indiana); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1039-44 (same); *see also* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 62 (2002) (citing empirical examination of death penalty decisions issued by the California Supreme Court between 1976 and 1996). It also has anecdotal support.[17]

These reasons underscore Justice Breyer's observation in *Ring* that "the danger of unwarranted imposition of the penalty cannot be avoided unless 'the decision to impose the death penalty is made by a jury rather than by a single governmental official.' " 536 U.S. at 618 (Breyer, J., concurring in the judgment) (quoting *Spaziano v. Florida*,

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17. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 470-75 (1999) (describing a variety of campaigns to unseat state judges based on their alleged failure to impose or affirm death sentences); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases*, 31 Colum. Hum. Rts. L. Rev. 123 *passim* (1999) (providing additional examples of judges under attack due to the outcomes of capital cases over which they presided); *Symposium, Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L.J. 239, 270-73 (1994) (presenting statements by judges participating in symposium in which they described criticism they faced during elections based on their decisions in capital cases).

468 U.S. 447, 469 (1984) (Stevens, J., concurring in part and dissenting in part)).

[16] For all of these reasons, exemplified by the facts of this case, there is little doubt that the rule announced in *Ring* will significantly improve the accuracy of capital trials in Arizona. This conclusion is not—and should not be considered as—a negative assessment of the many excellent state trial judges in Arizona, many of whom have been national leaders in improving the jury system. *See, e.g.*, B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 Judicature 280 (1996). However, the structure of Arizona capital sentencing allows extra-judicial factors to enter into the ultimate judgment such as the consideration of inadmissible evidence, political pressure, truncated evidentiary presentation, and prior experience with other capital defendants that would be absent from a jury's consideration of penalty-phase evidence.

[17] If the allegations concerning Judge Marquardt are true, Summerlin's fate was determined by a drug-impaired judge, habituated to treating penalty-phase trials the same as noncapital sentencing, who relied upon inadmissible evidence in making the factual findings that sentenced Summerlin to death. Although no system is perfect, relying on a jury to administer capital punishment unquestionably reduces the risk of error by reposing trust in twelve individuals who must agree as to the presence of aggravating factors beyond a reasonable doubt, whose continued job security is not threatened by their decision, and whose consideration is based solely on admissible evidence subject to the rigors of cross-examination.

Taking into account the heightened attention that the Eighth Amendment obligates us to afford capital cases, the inevitable conclusion must be that a requirement of capital findings made by a jury will improve the accuracy of Arizona capital murder trials.

The second requirement of the *Teague* exception provides that the newly announced rule must be a "watershed rule" that alters our understanding of bedrock procedural elements essential to the fairness of the proceeding. *Sawyer*, 497 U.S. at 242. Although Eighth Amendment concerns are implicated in *Ring*, the bedrock procedural element at issue is the provision of the Sixth Amendment right to a jury trial.

Ring not only changed the substantive criminal law of Arizona, but it fundamentally altered the procedural structure of capital sentencing applicable to all states. *Ring* established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty. 536 U.S. at 609. *Ring* requires the vacation of a capital judgment based on judge-made findings.

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). If structural error is present, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citation omitted).

Depriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty is an error that necessarily affects the framework within which the trial proceeds. Indeed, the trial has proceeded under a completely incorrect, and constitutionally deficient, framework. In short, allowing a constitutionally-disqualified factfinder to decide the case is a structural error, and *Ring* error is not susceptible to harmless-error analysis.

This conclusion is compelled by the analysis in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In that case, the Supreme Court

considered whether a deficient reasonable-doubt instruction[18] was subject to harmless-error analysis. *Id.* at 277. In resolving the question, Justice Scalia first noted that the Sixth Amendment right to a jury trial "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding." *Id.* at 277 (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)). To determine whether harmless error exists, he noted, the Supreme Court must examine "the basis on which 'the jury *actually rested* its verdict.' " *Id.* at 279 (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis added in *Sullivan*)). Given that, Justice Scalia observed the "illogic of harmless-error review" under those circumstances because a review could occur only if a court "hypothesize[d] a guilty verdict that was never in fact rendered." *Id.* at 279-80. The Court thus concluded that the *Cage* error was structural because any constitutionally defective reasonable doubt jury instruction "vitiates *all* the jury's findings" and "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done." *Id.* at 281 (emphasis in original). "And when it does that, 'the wrong entity judge[s] the defendant guilty.' " *Id.* (quoting *Rose*, 478 U.S. at 578) (alteration in original).

In our case, the wrong entity found Summerlin to be guilty of a capital crime. Here, as in *Sullivan*, there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review. A complete deprivation of the right to a jury is an error that does not arise during a presentation to a jury. Rather, such an error indisputably affects "the framework within which the trial proceeds." *Rose*, 478 U.S. at 310. This type of error cannot be cured, or determined harmless, by examining other mitigating circumstances that may have been presented at trial because, as Justice Scalia observed:

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18. The instruction at issue in *Sullivan* was similar to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). Thus, the question in *Sullivan* was whether *Cage* error was subject to harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967).

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 508 U.S. at 280 (citing *Bollenbach v. United States*, 326 U.S. 607, 614 (1946)).[19]

Sullivan's logic thus applies with even greater force where, as here, there was *no jury finding at all*. As Justice Scalia observed in *Sullivan*, under the Sixth Amendment, a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." *Id.* at 277. If a judge is constitutionally precluded from directing a verdict for the State, then, perforce, a judge sitting without a jury cannot constitutionally enter a judgment of conviction for capital murder. In this sense, *Ring* error indisputably affects the framework of the trial and must therefore constitute structural error.

The Supreme Court's recent opinion in *Nguyen v. United States*, 123 S. Ct. 2130 (2003), reaffirms that any decision of an improperly constituted judicial body must be vacated. In *Nguyen*, the Supreme Court assessed a series of judgments rendered by a federal appellate court panel on which a "non-Article III judge" served. 123 S. Ct. at 2133-34. Vacating this group of judgments, the Supreme Court reasoned that an appellate panel that included a non-Article III judge proved an "impermissible" and "unauthorized" decisional body, one that necessarily conflicted with a "strong policy concerning the proper administration of judicial business." *Id.* at 2135-36 (citation and internal quotation marks omitted). Because the "validity" of the relevant

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19. Likewise, we have held that a constitutionally deficient indictment is a structural defect requiring reversal because the indictment "fail[ed] to ensure that [the defendant] was prosecuted only 'on the basis of the facts presented to the grand jury.'" *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (quoting *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994)). We noted that "[f]ailing to enforce this requirement would allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment.' " *Id.* (quoting *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979)).

judicial body was fundamentally flawed, and because this "plain defect" was incurable, *Nguyen* explained, the decisions reached by that body must be vacated. *Id.* at 2137-38; *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-85 (1982) (holding that delegation to adjunct bankruptcy judges of powers beyond those conferred to non-Article III judges rendered an entire administrative scheme unconstitutional).

The principle animating *Sullivan, Nguyen,* and *Northern Pipeline* provides that where an improperly constituted or situated tribunal reaches a decision, that decision is infected with a "plain defect" and must be vacated. *Nguyen,* 123 S. Ct. at 2137-38. Whether before an improperly constituted federal appellate panel, a flawed jury panel, a biased judge, or a judge without fact-finding authority in particular contexts, even an otherwise error-free trial is subject to reversal because the error affects the very framework within which the trial proceeds. *Id.* Such structural error indisputably arises here.[20]

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20. The Arizona Supreme Court did not have the benefit of *Nguyen* when it decided *Towery* and *Ring II*. Thus, the Court assumed that the question of "who[ ] decides" the existence of aggravating circumstances was susceptible to harmless-error review. *Towery*, 64 P.3d at 834-35. For the reasons already discussed, however, harmless error cannot be assessed in a void, and, without a jury finding, there is nothing for the appellate court to review. The Arizona Supreme Court primarily relied on *Neder v. United States*, 527 U.S. 1 (1999), but *Neder* in fact buttresses, rather than controverts, our conclusion that *Ring* error is structural. In *Neder*, the Supreme Court held that the failure to submit a materiality instruction was subject to harmless-error analysis. 527 U.S. at 8-15. This, the Arizona Supreme Court reasoned, was akin to depriving a defendant a jury trial in a capital case penalty phase. *Towery*, 64 P.3d at 834-35. But *Neder* itself provides the crucial analytic distinction by identifying structural errors not susceptible to harmless-error analysis, namely errors that "infect the entire trial process." 527 U.S. at 8 (citing *Brecht v. Abrahamson*, 507 U.S. at 630). These are errors that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Id.* (quoting *Rose*, 478 U.S. at 577- 78). Examples of structural error provided by *Neder* are racial discrimination in jury selection, *see Vasquez v. Hillery*, 474 U.S. 254 (1986); biased judges, *see Tuney v. Ohio*, 273 U.S. 510 (1927); and denials of public trials, *see Waller v. Georgia*, 467 U.S. 39 (1984). *Neder*, 527 U.S. at 8. As (continued...)

Application of the heightened scrutiny commanded by the Eighth Amendment in capital cases underscores the structural nature of this Sixth Amendment constitutional infirmity. The Sixth Circuit recently considered whether harmless-error analysis could apply in a capital case under similar circumstances in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), *petition for cert. filed*, Nos. 02-1369, 02-8849, 71 U.S.L.W. 3613 (Mar. 4, 2003). In that case, the Sixth Circuit held that a death sentence could not be imposed when the state had failed to charge the aggravating circumstance and the jury had not found the aggravating circumstance beyond a reasonable doubt. *Id.* at 420. In reaching its decision, the Sixth Circuit specifically rejected the theory that a harmless-error analysis under a *Neder* theory could apply, noting that "[t]here is no suggestion in the Chief Justice's opinion in *Neder* that harmless error would protect a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case." *Id.* at 421. The court further noted:

> Harmless-error review in [capital] cases should apply only when the jury has actually performed its function under the Eighth Amendment. The jury in this case never made a judgment at all on the only possible aggravating circumstance—a constitutionally indispensable requirement without which the death penalty cannot be imposed. The State's argument that the error here can be excused as harmless would lead to the conclusion that any, or all, elements required by a state's capital sentencing system may be supplied by judges rather than the jury. Neither the Eighth Amendment nor Ohio's own statutes adopted in order to comply with it permit such a gross deviation from the principle of jury sentencing according to expressly stated, clear statutory standards.

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20. (...continued)
Neder makes clear, for structural error, it does matter "who decides" the case and in what context. There is a vast difference between not submitting the element of materiality to the jury for decision and having no jury decision at all.

Id. at 422.

Given *Ring*'s declaration that a defendant is entitled under the Sixth Amendment to a jury verdict in the penalty phase of a capital case, the substitution of a non-jury verdict cannot be subject to harmless-error analysis. *Ring* error is one " 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *Neder,* 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310).

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That *Ring* error is structural is a critical consideration in determining whether the second *Teague* exception has been satisfied. It does not, however, end our inquiry. *See Tyler v. Cain,* 533 U.S. 656, 666-67 (2001). The Supreme Court has explained on numerous occasions that a "truly watershed case" is one of a "small core of rules" that is "groundbreaking." *See, e.g., O'Dell*, 521 U.S. at 167; *Caspari*, 510 U.S. at 396; *Graham*, 506 U.S. at 478. The newly announced rule must enhance accuracy, improve fairness, and dictate "observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (plurality) (internal quotation marks omitted).

As previously noted, the procedure at issue in *Ring* had been reviewed by the Supreme Court on prior occasions and had been found constitutionally sound. *See Apprendi*, 530 U.S. at 496-97; *Walton*, 497 U.S. at 649. In a sharp reversal of course, however, the Supreme Court in *Ring* determined that when the Arizona court adhered to prior Supreme Court law, it violated the defendant's fundamental right to have his guilt determined by a jury trial.

The Supreme Court's decision in *Ring* affects the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates. It involves the structure of penalty-phase trials which, unlike non-capital sentencing proceedings, are subject to the constraints of the Double Jeopardy Clause. *Bullington,* 415 U.S. at 439. Thus, *Ring*'s effect on capital murder cases is akin to

that of *Furman,* which declared that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional. *Furman*, as already noted, was given full retroactive effect for the purposes of federal habeas review. *See Moore*, 408 U.S. at 800.

Ring's impact thus is far greater than the impact of the *Mills/McKoy* rule, which some of our sister circuits have determined to be a "watershed rule" under *Teague*. *See Gall v. Parker*, 231 F.3d 265, 323-24 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Williams v. Dixon*, 961 F.2d 448, 455-57 (4th Cir. 1992).[21]

In *Williams*, Chief Judge Ervin analyzed the *Mills/McKoy* rule in detail and concluded that: "Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentences, we believe that a rule striking down an arbitrary unanimity requirement has the same 'primacy and centrality' of *Gideon* [*v. Wainwright*, 372 U.S. 225 (1963)]." 961 F.2d at 456. The Fourth Circuit underscored the language in *Mills* that "it would certainly be *the height of arbitrariness* to allow or require the imposition of the death penalty under the circumstances [where one holdout juror prevents the consideration of mitigating evidence]." *Id.* (quoting *Mills*, 486 U.S. at 374) (emphasis added and alterations inserted in *Williams*).[22]

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21. The *Mills/McKoy* rule struck down state procedures that limited any given juror's consideration of mitigating circumstances in capital sentencing to such evidence that the entire jury had found relevant. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). Both the Fourth and the Sixth Circuits have held that the "*Mill/McKoy*" rule is a "watershed rule" that warrants retroactive application.

22. *But see Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992) (holding without analysis that *Teague* bars retroactive application); *Miller v. Lockhart*, 65 F.3d 676, 686 & n.6 (8th Cir. 1995) (holding that *Teague* bars retroactive application of *Mills* and observing that the defendant never raised argument that *Mills* falls into a *Teague* exception).

Ring does not merely announce a supplemental procedural safeguard. Rather, it establishes bedrock procedural requirements that affect the structure of every penalty-phase hearing in a capital case. Application of the rule in *Ring*, like the *Mills/McKoy* rule and other watershed rules, will increase the accuracy of capital murder trials significantly. The absence of the rule's protection necessarily constitutes structural error and deprives a defendant of a fundamental right.

[18] Moreover, *Ring* implicates the foundation of the capital murder trial itself by declaring that judges are constitutionally unqualified to decide whether a defendant is eligible for the death penalty. Thus, the rule in *Ring* is central to the conduct of every capital murder trial. *Ring* "effectively declare[d] five States' capital sentencing schemes unconstitutional," *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting), and cast doubt on the viability of at least four other state capital murder statutes. *Id.; see also Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Attorney's Ass'n, Pennsylvania, South Carolina, Utah, and Virginia to the Supreme Court in Ring* at *4 & n.2, *Ring* (No. 01-488), *available at* 2002 WL 481140. In short, *Ring* directly impacted the substance of approximately one-fourth of the 38 state capital murder statutes and established irreducible minimum structural requirements for all. It fundamentally altered our view of how the Sixth Amendment right to a jury trial affected the Eighth Amendment's requirement that state statutes narrow the class of individuals eligible for the penalty of death. By deciding that judges are not constitutionally permitted to decide whether defendants are eligible for the death penalty, the Supreme Court altered the fundamental bedrock principles applicable to capital murder trials. When viewed in both theoretical and practical terms, *Ring* redefined the structural safeguards implicit in our concept of ordered liberty.

[19] The *Teague* doctrine was based on the notion that one of the "principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Bousley*, 523 U.S. at 620

(alteration in original; internal quotation marks omitted). The rule announced in *Ring*, like other watershed rules, is designed to reduce significantly the risk of an erroneous capital verdict. Thus, the rule announced in *Ring* defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. *Ring* satisfies the criteria of *Teague* and must be given retroactive effect on habeas review.

D

The Warden's primary argument against applying *Ring* retroactively relies on *United States v. Sanchez-Cervantes*, in which we held that *Apprendi* may not be applied retroactively on habeas review. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 670 (9th Cir. 2002). However, our analysis in *Sanchez-Cervantes* does not conflict with our conclusion that *Ring* must be applied retroactively. First, as we have noted, the decision in *Apprendi* clearly was not one of substantive criminal law. Unlike the result in *Ring*, *Apprendi* did not cause the relevant statute to be declared unconstitutional. Second, *Apprendi* errors are not structural and therefore are subject to harmless-error analysis. *Id.* at 669-70 (citing *Buckland*, 277 F.3d at 1184) (internal quotation marks omitted). Third, as we reasoned in *Sanchez-Cervantes*, *Apprendi* was neither a rule that greatly enhanced the accuracy of sentencing proceedings nor a "sweeping rule" in light of the finding that it "would apply only in a limited number of cases." *Id.* at 669. Accordingly, it could not qualify as a "watershed" rule. Fourth, capital cases are structurally much different from noncapital criminal trials. As already noted, non-capital sentencing has historically been within the province of the judge. In contrast, the penalty-phase proceeding of a capital murder case "resembles a trial," *Walton*, 497 U.S. at 704, and, unlike the non-capital sentencing proceedings, is subject to the constraints of the Double Jeopardy Clause. *See Bullington*, 451 U.S. at 439. Finally, the Eighth Amendment constraints applicable to capital trials demand a heightened analysis inapplicable to the usual *Apprendi* situation. Thus, neither *Sanchez-Cervantes* nor the retroactive application of *Apprendi* governs our analysis.

VI

[20] In summary, we affirm the district court's judgment denying Summerlin's petition for habeas corpus for relief from his conviction for first-degree murder. We hold, both on substantive and procedural grounds, that the Supreme Court's decision in *Ring* has retroactive application to cases on federal habeas review. Thus, we reverse the judgment of the district court insofar as it relates to the imposition of the penalty of death.

Given our resolution of the penalty-phase issues based on the retroactive application of *Ring*, we need not, and do not, reach the merits of any of the other penalty-phase errors raised on appeal. We also need not reach the issue of whether cumulative errors require reversal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

REINHARDT, Circuit Judge, concurring:

I join fully in Judge Thomas's excellent opinion for the court. I could not improve on the legal arguments he has offered. I agree entirely that *Ring* establishes a new substantive rule and that to the extent the rule is procedural it constitutes a watershed rule that enhances the accuracy of capital sentencing and alters our understanding of a bedrock procedural provision.

I write separately only to emphasize that a contrary result would be unthinkable in a society that considers itself both decent and rational. Few seriously doubt that the death penalty is generally imposed in an arbitrary manner in this nation. The vagaries of the process by which prosecutors select those they believe worthy of death; the chances that defendants will be assigned incompetent rather than competent legal counsel, and that such representation will continue throughout the state and federal direct and collateral proceedings; the fortuitous circumstances which in combination account for the fact-finders'

decisions in capital proceedings as to who shall live or die: all result in a system of execution by chance or fate. And this is wholly aside from factors such as race, IQ, poverty, wealth, geography, and sex, each of which plays a significant part in the business of determining which persons the state decides to execute.

But surely there is a limit to arbitrariness — even to arbitrariness in the imposition of the death penalty. And executing people because their cases came too early — because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error in its interpretation of death penalty law, that it had erred when it failed to recognize that the United States Constitution prohibits judges, rather than jurors, from making critical factual decisions regarding life and death in capital cases — is surely arbitrariness that surpasses all bounds.

It is not uncommon for the Supreme Court to make significant errors in interpreting the constitution, *see, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Walton v. Arizona*, 497 U.S. 639 (1990), and to correct those errors when it recognizes its mistakes, *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Lawrence v. Texas*, 123 S.Ct. 2472 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002). The Court is to be commended for the integrity it displays in acknowledging its failures in such cases. Ordinarily, the consequences are that the judicial reversal is greeted with relief and the error has no further adverse effects. Certainly, all must agree that constitutional errors made by the Court should not have any greater adverse consequences than necessary. Here, however, in the dissent's view, additional people should now be put to death following unconstitutional proceedings even though the Court has recognized the unconstitutionality inherent in those future executions, and even though had the Court not erred initially, the death sentences in question would previously have been set aside. To me, this represents a seriously warped view of the nature of our legal system, and the relationship of that system to its ultimate objective: justice.

The dissent expresses a peculiar lack of confidence in juries, and states that the "conscience of the community is not necessarily the fairest adjudication for a capital defendant" because considerations of race and other biases influence jurors' actions. Our recent experience shows precisely the opposite. When the Attorney-General decided to order federal death penalty prosecutions in a far wider range of cases and places than ever before, juries responded by expressing the "conscience of the community." Since General Ashcroft has launched his expanded federal death penalty campaign, sometimes over the objections of local federal prosecutors, juries have returned 21 verdicts. In 20 of them they have voted for life rather than death.[1] Despite those who distrust it, the "conscience of the community" is indeed, a fair, democratic, and unbiased expression of societal values. To distrust juries is plainly to distrust democracy.

But even more important, my dissenting colleagues believe that it is perfectly proper for the state to execute individuals who were deprived of their constitutional right to have a jury make their death penalty decisions, if the judicial machinery had brought the direct appeal portion of their legal proceedings to an end before the day on which the Supreme Court recognized its constitutional error. In other words, my colleagues believe that those who had reached the stage of habeas proceedings as of the day of the Court's belated enlightenment may be executed, but those who were still awaiting a final answer to their appeals may not.

Wholly aside from the fact that the majority is unquestionably correct with respect to its careful analysis of retroactivity law, I remind my dissenting colleagues that "death is different." *Ring v. Arizona*, 536 U.S. 584, 606 (2002); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)

1. See list of cases on file in Clerk's office.

(plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."). We do not execute people according to ordinary legal principles that may be good enough for our more routine decisions. When the state assumes the role of the Deity, it must exercise greater care. Thus, even if the dissenting argument were more closely attuned to traditional retroactivity law — even if that law demanded a different result in run-of-the-mill cases — I would not apply those rules here. In order to understand why, we need only look to the facts revealing the inherent fallibility of our criminal justice system.

This country imposed approximately 5,760 death sentences between 1973 and 1995.[2] During that time, "courts found *serious, reversible error in nearly 7 of every 10* of the thousands of capital sentences that were fully reviewed during the period."[3] State courts reviewed 4,578 of those cases and reversed 41% for serious error on direct appeal; another 10% were reversed on state collateral review.[4] Federal courts found error in 40% of the 599 cases which state courts affirmed. 82% of defendants who received a second trial after a successful state collateral petition did not receive a death sentence; 7% of those defendants were found innocent or had their charges dropped. Recently in Illinois, a conservative Governor declared a moratorium on executions after discovering that since the death penalty was reinstated, more individuals convicted of capital crimes and sent to death row had been exonerated than executed. Following a full investigation, he pardoned some of the prisoners on death row and commuted the

2. *See* James S. Liebman, et al., *Broken System: Error Rates in Capital Cases, 1973-1995* at 5 (2000) *available at* <http://justice.policy.net/jpreport/>.

3. *Id.* at i (emphasis added).

4. *See id.* at 38-40.

sentences of the rest.[5] Since 1973, one hundred and eight people nationwide have been released from death row upon evidence of their innocence; there is no comparable statistic yet available for those who have been executed.[6] It is virtually certain that other people who are actually innocent — much less those convicted in violation of the Constitution — currently await execution.

Let me put the abstract problem of the retroactivity of *Ring* in perspective, and let me state it as clearly as possible. In *Walton v. Arizona*, 497 U.S. 639 (1990), Jeffrey Alan Walton tried to persuade the then-members of the Supreme Court that a jury, not a judge, must make the critical factual decisions regarding his ultimate fate. In rejecting his argument, the Court erred, as it now concedes. In *Walton*, the Court mistakenly decided that the Constitution did not entitle capital defendants to a jury trial at the penalty phase. All death row prisoners who advanced the constitutional argument that Walton had unsuccessfully asserted subsequently received the same answer that he did. Some capital defendants continued to assert the claim, hoping that the Court would change its mind. Others believed that it would be futile to continue to make an argument that the Court had just rejected. As a result of the Court's error, some of these individuals have already been executed in violation of their constitutional rights. Others are still awaiting execution. The question before us is: may the state now execute those persons as to whom the Supreme Court ruled erroneously (directly or indirectly) with respect to their constitutional claims, although it is prevented from executing those as to whom the Court had not yet formally erred? May the state execute the "Jeffrey Alan Waltons" who are now on death row — the prisoners who previously

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5. *See, e.g.*, Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1.

6. *See* Death Penalty Info. Ctr., Innocence and the Death Penalty, *at* www.deathpenaltyinfo.org/article.php?did=412&scid=6 (visited July 5, 2003). As of June 2003, DNA tests — a reasonably new scientific development — have established the innocence of at least 128 individuals who were wrongly convicted and imprisoned. *See* David Feige, *The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003, § 6, at 15.

correctly argued (or were incorrectly deterred from arguing) that their executions would be unconstitutional, the prisoners whose causes were erroneously turned down by the Supreme Court — the prisoners who were right about the Constitution when the Supreme Court was wrong?

To put it differently, may the state now deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights? Is it possible that prisoners will now be executed by the state solely because of the happenstance that the Supreme Court recognized the correctness of their constitutional arguments too late — on a wholly arbitrary date, rather than when it should have? Will we add to all of the other arbitrariness infecting our administration of the death penalty the pure fortuity of when the Supreme Court recognized its own critical error with respect to the meaning of the Constitution? Can we justify executing those whose legal efforts had reached a certain point in our imperfect legal process on the day the Supreme Court changed its mind, while invalidating the death sentences of those whose cases were waiting slightly further down the line?

I do not think it rational for a society to make its decisions regarding whom it will kill in the manner that my dissenting colleagues suggest. A state's decision to take the life of a human being, if it can be justified at all, must rest on a far less arbitrary foundation. And if our society truly honors its constitutional values, it will not tolerate the execution by the state of individuals whose capital sentences were imposed in violation of their constitutional rights. It should not take a constitutional scholar to comprehend that point.

RAWLINSON, Circuit Judge, with whom O'SCANNLAIN and TALLMAN, Circuit Judges, join, dissenting:

I must respectfully dissent from that portion of the majority opinion discussing the retroactive application of *Ring v. Arizona*. The majority opinion negates the presumption against retroactive application of a new rule articulated in *Teague v. Lane*, 489 U.S. 288, 304, 310 (1989). The underpinning of the majority opinion is an

assumption that the Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), represents a new substantive rule or, alternatively, a new procedural rule that seriously enhances accuracy of capital sentencing proceedings, and alters our understanding of "bedrock procedural elements essential to the fairness of the proceeding." Maj. Op. at 12760 (citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

I. The *Ring* Decision Announces A Procedural Rule Rather Than A Substantive One.

A. Ring's *Reliance upon and Similarity to* Apprendi

In my view, the majority opinion wanders afield in the first instance by holding that *Ring* contains a new substantive rule despite the teaching of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which the Supreme Court expressly relied in deciding *Ring*. *See Ring v. Arizona*, 536 U.S. at 602.

In *Apprendi*, the defendant pled guilty to two counts of second-degree possession of a firearm and one count of unlawful possession of a bomb. 530 U.S. at 469-70. After accepting Apprendi's guilty plea, the trial court conducted a hearing and concluded that Apprendi's firing of several bullets into the home of an African-American family was "motivated by racial bias." *Id.* at 470-71. This conclusion resulted in a "hate crime enhancement," doubling the maximum potential sentence. *Id.* Apprendi was sentenced to a twelve-year term of imprisonment, two years more than the ten-year maximum for the firearms offense. *Id.* at 474.

The Supreme Court recognized that the constitutional guarantees embedded in the Sixth Amendment and the Fourteenth Amendment were at stake. *Id.* at 476-77. In keeping with those guarantees, the Court rendered the ruling that resonated throughout the country: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In *Ring v. Arizona*, quoting extensively from *Apprendi*, the Supreme Court addressed the Sixth Amendment right to a jury trial in the context of capital sentencing. 536 U.S. at 602-03.

The Supreme Court described its holding in *Apprendi* as a determination "that Apprendi's sentence violated his right to a jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt. That right attached not only to Apprendi's weapons offense but also to the hate crime aggravating circumstance." *Id.* at 602 (citation, internal quotation marks and alteration omitted).

In overruling *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court in *Ring* noted that, as with the "hate crime" aggravator in *Apprendi*, "Arizona's enumerated aggravated factors [necessary for imposition of the death penalty] operate as the functional equivalent of an element of a greater offense . . . . at *Ring*, 536 U.S. at 609 (citation and internal quotation marks omitted).

The Supreme Court quoted Justice Thomas's concurring opinion in *Apprendi* in recognizing that:

> if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, *the core crime and the aggravating fact together constitute an aggravated crime*, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

536 U.S. at 605 (citation, internal quotation marks and alterations omitted) (emphasis added).

This conclusion of the *Ring* court is pivotal because it is the unlikely linchpin of the majority's conclusion that the Supreme Court's holding in *Ring* is a rule of substance rather than procedure for purposes of the *Teague* retroactivity analysis.

The majority opinion urges us to accept the following syllogism:

- Creation of a separate substantive criminal offense renders a new rule one of substance rather than procedure for purposes of the *Teague* analysis. Maj. Op. at 12751.

- *Ring's* holding requiring that a jury determine the existence of aggravating factors necessary for imposition of the death penalty, creates a distinct offense of capital murder. Ma

- *Ring's* ruling is one of substance rather than procedure for purposes of the *Teague* retroactivity analysis. Maj. Op. at 12752-53.

At first glance, the majority opinion's reasoning exudes considerable appeal. However, closer examination of the first point of the syllogism tarnishes the initial appeal of the majority's logic. Why? Because merely saying that creation of a separate substantive criminal offense renders a rule one of substance rather than procedure does not make it so. If that were true, *Apprendi* would have been a substantive rather than a procedural ruling. As the Supreme Court noted in *Ring*, the "hate crime" aggravator in *Apprendi* operated in the same manner as the death penalty factors in *Walton* to establish a "greater offense." 536 U.S. at 609.

The linkage in *Ring* of the *Walton* death penalty factors and the *Apprendi* hate crime aggravator is fatal to the majority's syllogism. The majority opinion acknowledges, as it must, our recent holding that *Apprendi* may not be applied retroactively on habeas review. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 670 9th Cir. 2002. Maj. Op. at 12780. The majority makes the following four points in an attempt to distance itself from our holding in *Sanchez-Cervantes:*

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1. The decision in *Apprendi* clearly was not one of substantive law. Maj. Op. at 12780.[1]

Counterpoint: It is equally clear that *Ring* is not a decision of substantive law. As the United States Supreme Court noted in *Ring*, the aggravator in *Apprendi* operated in the same fashion as the aggravators in *Walton* to establish a separate offense. *See Ring*, 536 U.S. at 609. That similarity is more telling than whether or not the statute in question is declared unconstitutional.

2. *Apprendi* violations are subject to harmless error analysis. Maj. Op. at 12780.

Counterpoint: The Supreme Court in *Ring* strongly implied, if not outright held, that harmless error analysis is equally applicable to any imposition of the death penalty by a judge rather than a jury. *See* 536 U.S. at 609. n.7 (citing *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) ("this Court ordinarily leaves it to lower courts to pass on the harmlessness of the error in the first instance"); *see also id.* at 621 (O'Connor, J., dissenting) ("I believe many of these [*Ring*] challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless or plain error review, or because, having completed their direct appeals they will be barred [by *Teague*] from taking advantage of today's holding on collateral review.") (citations omitted).

3. *Apprendi* was not a watershed rule of procedural law. Maj. Op. at 12780.

Counterpoint: Neither is *Ring* a watershed rule of procedural law. For the reasons discussed in section II below, the rule pronounced in *Ring* would not greatly enhance the accuracy of sentencing proceedings, and would affect only a limited number of cases.

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1. The Majority Opinion's discussion of the retroactivity of *Apprendi* is included in its alternative discussion of *Ring* as a new procedural rule. However, that discussion is also pertinent to the comparison of *Ring*, *Walton*, and *Apprendi*.

4. Capital cases are structurally different. Maj. Op. at 12780.

Counterpoint: The existence of a capital murder offense does not *per se* establish the substantive nature of the *Ring* ruling. In fact, the Supreme Court recognized in *Ring* that even before the adoption of the Bill of Rights, juries were determining which homicide defendants would be subject to capital punishment. 536 U.S. at 599 (quoting *Walton v. Ariz.*, 497 U.S. 639, 711, Stevens, J., dissenting). A return to that well-established tradition does not lead to the ineluctable conclusion that a substantive rule of law has been established.

Proper application of the holdings in *Ring* and *Apprendi* leads to the opposite conclusion than that reached in the majority opinion: *Ring* did not create a new substantive rule.

B. *The Arizona Supreme Court's* Ring *Analysis*

The majority opinion recognizes that the Arizona Supreme Court has reached the opposite conclusion, namely that *Ring* did not create a new substantive rule. Maj. Op. at 12752. The majority opinion justifies its disregard of the Arizona Supreme Court's holding by stating that "[b]ecause the decisions in [*State v.*] *Towery* [65 P.3d 828 (Ariz. 2003),] and [*State v.*] *Ring* [65 P.3d 915 (Ariz. 2003)] rest on federal law, and not state law, they do not bind us." Maj. Op. at 12752. However, the Supreme Court suggested otherwise in *Ring*, ruling that "the Arizona court's construction of the State's own law is authoritative[.]" 536 U.S. at 603 (citation omitted). The Supreme Court was addressing "the *Apprendi* majority's portrayal of Arizona's capital sentencing law." *Id.* Similarly, in this case we are addressing the *Ring* majority's portrayal of Arizona's capital sentencing law, with the Arizona Supreme Court's construction carrying the same authority. *See id.*

In *Towery*, the Arizona Supreme Court examined Arizona's capital sentencing scheme in light of the *Ring* decision. The Arizona

Supreme Court, with its presumably authoritative grasp of Arizona's statutory scheme, declared that *Ring*:

> changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, *Ring* [ ] altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings."

64 P.3d at 833 (emphasis in the original).

In short, *Ring* changed the "who" of the capital sentencing determination, not the "what." A change in who determines the existence of the aggravating factors is quintessentially procedural. *See Sanchez-Cervantes,* 282 F.3d at 668.

The decision of the Arizona Supreme Court in *Towery* is consistent with the United States Supreme Court's explanation of *Apprendi* in *Ring* and our *Teague* analysis of *Apprendi* in *Sanchez-Cervantes.*

C. *Our Sister Circuits'* Ring *Analysis*

> The Tenth and Eleventh Circuit Courts of Appeal have both addressed and rejected retroactive application of *Ring*. The Tenth Circuit court matter-of-factly concluded that *Ring* "is simply an extension of *Apprendi* to the death penalty context. Accordingly, this court's recent conclusion . . . that *Apprendi* announced a rule of criminal procedure forecloses [the] argument that *Ring* announced a substantive rule." *Cannon v. Mullin,* 297 F.3d 989, 994 (10th Cir. 2002) (citation omitted).

Likewise, our recent ruling in *Sanchez-Cervantes* that *Apprendi* pronounced a new rule of criminal procedure, 282 F.3d at 668, forecloses the majority's conclusion that *Ring* pronounced a new substantive rule. As our colleague recently observed when discussing our holding in *Sanchez-Cervantes*:

> We arrived at this conclusion even though every application of the constitutional rule [announced in *Apprendi*] requires distinguishing between the statute's 'elements' and 'sentencing factors' and even though it's almost certain, as a simple matter of mathematical probability, that some defendants would not have been convicted had the statutory elements been submitted to a jury of twelve, instead of decided by a judge alone. There may well be a plausible argument that, because *Apprendi* narrows the class of persons who is likely to be convicted, the rule is substantive. But we have already rejected this argument. Instead, we characterized the rule as procedural because *Apprendi* affects only the identity of the decisionmaker and the burden of proof .
> . . .

United States v. Montalvo, 331 F.3d 1052, 1061 (9th Cir. 2003) (Kozinski, J., concurring).

The Eleventh Circuit case, *Turner v. Crosby*, 2003 WL 21739734 (11th Cir. July 29, 2003), contains a more expansive discussion of the *Ring* retroactivity issue. The court, as did the court in the Tenth Circuit, linked its characterization of *Ring* as a procedural rule to *Ring*'s "status as an extension of *Apprendi*." *Id.* at *35. The court concluded that "because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule." *Id.* at *34.

The analysis in *Turner* is remarkably similar to Judge Kozinski's concurring opinion in *Montalvo*, discussing our holding in *Sanchez-Cervantes. See* 331 F.3d at 1061.

The Eleventh Circuit court reasoned:

> Just as *Apprendi* constitutes a procedural rule because it dictates what fact-finding procedure must be employed, *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. *Ring* changed neither the underlying conduct the state must prove to establish a defendant's crime warrants
> death nor the state's burden of proof. *Ring* . . . altered only *who* decides whether any aggravating circumstances exist and, thus, altered only the factfinding procedure.

Turner, 2003 WL 21739734 at *34 (internal quotation marks and citations omitted) (emphasis in the original).

II *Ring's* Procedural Rule Does Not Fit Within Any Exception to *Teague's* Retroactivity Prohibition.

The majority opinion's alternative holding is that even if *Ring* announced a procedural rule, it nonetheless fits within an exception to the *Teague* retroactivity prohibition. Maj. Op. at 12758.

I disagree with the majority's conclusion that *Ring* is a new procedural rule that seriously enhances the accuracy of capital sentencing proceedings and alters our understanding of bedrock procedural principles. Maj. Op. at 12771.

A. *Serious Enhancement of the Proceedings' Accuracy*

The majority opinion makes its case for accuracy by attacking the objectivity of judges in the capital sentencing context. Maj. Op. at 12760-71. The majority opinion lists the following five problematic circumstances with judge-based capital sentencing:

1. Presentation of inadmissible evidence to judges;

2. More truncated and informal presentation of evidence and argument;

3. Lack of "the conscience of the community";

4. Acclimation of the judge to the capital sentencing process; and

5. Political pressure on judges facing election.

Id.

As with most other matters, there is another side to the story, reflecting the fact that juries have their own problems in the capital sentencing context.

The Capital Jury Project, funded by the National Science Foundation, is an empirical study of "death penalty decision making by jurors." Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 Cornell L. Rev. 1, 2 (1993). 916 capital jurors, from 257 capital trials in eleven states, were interviewed. The study revealed that:

> many jurors reached a personal decision concerning punishment before the sentencing stage of the trial,

> before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision. Moreover, most of the jurors who indicated a stand on punishment at the guilt stage of the trial said they were "absolutely convinced" of their early stands on punishment and adhered to them throughout the course of the trial.

William J. Bowers, Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt—Trial Experience, and Premature Decision Making,* 83 Cornell L. Rev. 1476, 1477 (1998).

The study also disclosed that many "early pro-death jurors" presumed that overwhelming proof of guilt justified imposition of the death penalty. *Id.* at 1497. More than half of the jurors were of the view that "death was the only acceptable punishment for . . . repeat murder, premeditated murder and multiple murder." *Id.* at 1504. The data in the study has been described as supporting a conclusion that:

> the presence of structural aggravation and the nature of the life or death decision itself will continue still to promote premature punishment decision making, thus discouraging a full and open evaluation of constitutionally sanctioned sentencing considerations. Beyond this, the data show that punishment concerns also invade and befoul the work of guilt decision making. Jurors frankly admit that they consider punishment in deciding guilt, despite admonitions not to do so.

Id. at 1541.

Any indecision in death penalty deliberations is more likely to be resolved in favor of death. Eisenberg and Wells, *Deadly Confusion,* 79 Cornell L. Rev. at 13. The study suggests that "a defendant on trial

for his life at the punishment stage has one foot in the grave . . . . The juror favoring life faces a struggle . . . that will last throughout the deliberations . . ." *Id.* at 14.

One analysis of the Project's data focused on the South Carolina component of the study. South Carolina "yielded the most extensive set of data of all the states participating . . . encompass[ing] interviews with 187 jurors in fifty-three cases tried in South Carolina between 1988 and 1997." Stephen P. Garvey, *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. Rev. 26, 28-29 (2000). This subset of data reveals that sympathy and pity pervade capital sentencing deliberations despite instructions to the contrary, *id.* at 34, and race is a dominant factor in determining who is sentenced to death. *Id.* at 45.

The empirically established problems with jury sentencing deliberations calls into question the majority's facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process.

The majority opinion bemoans the fact that inadmissible evidence is presented to judges. Maj. Op. at 12762-63. However, in most states the same inadmissible evidence that most concerns the majority, victim impact statements, is available to jurors. *See* Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. at 48.

The majority opinion also laments the informal presentation of evidence to a judge. Maj. Op. at 12761. In contrast, the Capital Jury Project reveals that more formal presentation of evidence is not of assistance to capital juries. To the contrary, jurors are confused by the aggravating and mitigating standards of proof, Eisenberg and Wells, *Deadly Confusion,* 79 Cornell L. Rev. at 10; are unclear as to whether and when the law mandates death, Bower, Sandys and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1523; and make up their minds before any evidence is presented as to the appropriate penalty. *Id.* at 1477.

The majority opinion views jury determination of the penalty as an indispensable manifestation of the jury's role as the "conscience of the community." Maj. Op. at 12766. However, empirical evidence suggests that the "conscience of the community" is not necessarily the fairest adjudication for a capital defendant. Not only do jurors prejudge defendants, they also engage in penalty negotiations during the guilt phase. Bowers, Sandys and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1477, 1527. Their decisions are tainted by considerations of sympathy, pity, anger and disgust. Garvey, *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. Rev. at 34. And their death determinations are influenced by race. *Id.* at 45.

The majority opinion notes that the judge's acclimation to capital sentencing may negatively influence the judge's assessment of the sentence. Maj. Op. at 12767-68. But not everyone views judges' experience as a negative. *See* Hon. Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest,* 55 J. Mo. B. 14, 17 (opining that unjust sentencing disparity is greatly reduced when judges rather than juries impose sentencing).[2]

Finally, the majority refers to the pressures on judges facing election to impose the death penalty. Maj. Op. at 12768. The majority cites to a law review article to support its statement that "judges who face election are far more likely to impose the death penalty." *See* Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 75 B.U. L. Rev. 759, 793 (1995). However, the statement made in the law review article is just that—a bald statement, with no accompanying empirical evidence.

The other law review article cited, Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override,* 1999 Wis. L. Rev. 1017, 1039-44, is a discussion of judicial overrides of jury

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2. Although this article addresses the unique Missouri statutory scheme whereby juries determine all sentences, the principle applies with equal force to capital sentencing.

determinations in Alabama, Florida, Indiana, and Delaware. The article does not even attempt to compare the relative rate of death sentences imposed by juries as opposed to judges. In any event, the comprehensive Capital Jury Project informs us that judges are not alone in facing pressure. Jurors are subjected to similar pressure when deliberating in capital cases. Jurors negotiate votes in order to "avoid [ ] the stigma of being a hung jury." Bowers, Sandys, and Steiner, *Foreclosed Impartiality,* 83 Cornell L. Rev. at 1527. In the final analysis, the jury is still out on the question of whether the decision in *Ring* enhances the accuracy of the capital sentencing process.

That fact defeats the majority opinion's premise that *Ring* fits within the first prong of the *Teague* exception applicable to new procedural rules. its analysis fares no better when the second prong is considered.

B. Ring's *Alteration of Our Understanding of Bedrock Procedural Principles*

The majority opinion rests its conclusion on the observations that *Ring* is not subject to harmless error analysis, and is of widespread application. Maj. Op. at 12772, 12776.

As previously discussed, the Supreme Court implied, if not held, that *Ring* requirements are subject to harmless error analysis. *See* 122 S. Ct. at 2443 n.7. Coupled with that circumstance is the limited application of *Ring* when contemplated in the proper context. Juries alone are responsible for deciding capital sentences in 29 of the 38 states with capital punishment laws. Holly Shaver Bryant, *Capital Punishment/The Death Penalty: Trends in 2002*, Report on Trends in the State Court, National Center for State Courts (2002). Accordingly, *Ring's* application is limited to capital cases in 9 states, a far cry from the majority's ambitious description of *Ring* as "affect[ing] the structure of every capital trial." Maj. Op. at 12777.

In addressing *Ring*'s exemption as a procedural rule from the *Teague* bar on retroactive application, the Eleventh Circuit court

described *Ring* as "not sufficiently fundamental" to constitute a "watershed" rule of criminal procedure. *Turner,* 2003 WL21739734 at *36. (citations omitted). Instead, the court characterized *Ring* as creating a rule "based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context." *Id.* at *37.

The majority's contrary holding that *Ring* created a new substantive rule or, in the alternative, a watershed rule of criminal procedure precipitates an unwarranted circuit split.

III. *Conclusion*

Whether analyzed as a new substantive rule or as a new rule of procedure, the decision in *Ring* does not fall within any of the exceptions set forth in *Teague*. The majority opinion's analysis is not compatible with Supreme Court precedent, our prior rulings, or the law of our sister circuits. In light of *Ring's* adherence to the precepts in *Apprendi*, I would declare the nonretroactivity of *Ring*, and affirm the district court's denial of Summerlin's habeas petition.

APPENDIX B

[FILED Feb 26 2003]

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Plaintiff, v. ROBERT CHARLES TOWERY, Defendant.	)	Arizona Supreme Court No. CR-02-0031-PC Maricopa County Superior Court No. CR 91-92648 CONSOLIDATED WITH
STATE OF ARIZONA, Plaintiff, v. ERIC OWEN MANN, Defendant.	)	Arizona Supreme Court No. CR-02-0022-PC Pima County Superior Court No. CR-44903 CONSOLIDATED WITH
STATE OF ARIZONA, Plaintiff, v. JAMES ERIN McKINNEY, Defendant.	)	Arizona Supreme Court No. CR-02-0038-PC Maricopa County Superior Court No. CR 1991-090926 CONSOLIDATED WITH

STATE OF ARIZONA, Plaintiff, v. ROGER WAYNE MURRAY, Defendant.	)	Arizona Supreme Court No. CR-02-0146-PC Mohave County Superior Court No. CR-13057 **OPINION**

Petition for Review from the Superior Court of Maricopa County
No. CR 91-92648
The Honorable Cheryl K. Hendrix
The Honorable James H. Keppel
AFFIRMED

Maynard, Murray, Cronin, Erickson & Curran, P.L.C. Phoenix
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Petition for Review from the Superior Court of Pima County
No. CR-44903
The Honorable John F. Kelly
AFFIRMED

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Petition for Review from the Superior Court of Maricopa County
No. CR 1991-090926
The Honorable Steven D. Sheldon
AFFIRMED

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Petition for Review from the Superior Court of Mohave County
No. CR-13057
The Honorable James E. Chavez
AFFIRMED

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McGregor, Vice Chief Justice

¶1 These consolidated actions present the question whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*),[1] which holds that a jury must decide whether aggravating circumstances exist in capital cases, applies retroactively to those defendants whose cases have become final. We conclude that *Ring II* does not apply retroactively to final cases.

I.

¶2 Separate juries found, beyond a reasonable doubt, that Murray, Mann, Towery, and McKinney committed first degree murder. In each petitioner's case, the trial judge conducted a sentencing hearing to determine whether aggravating circumstances existed. In each case, the judge found that the state proved, beyond a reasonable doubt, the presence of at least one aggravating circumstance and that the mitigating circumstances, if any, were not sufficiently substantial to call for leniency. Accordingly, Murray, Mann, Towery, and McKinney all received death sentences. This court affirmed each death sentence on

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1. In *State v. Ring*, 200 Ariz. 267, 279-80 ¶ 44, 25 P.3d 1139, 1151-52 (2001) (*Ring I*), guided by *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), this court held that Arizona's former capital sentencing scheme, in which a judge decided whether aggravating circumstances existed, comported with the Sixth Amendment.

direct review. *State v. Murray*, 194 Ariz. 373, 982 P.2d 1287 (1999); *State v. Mann*, 188 Ariz. 220, 934 P.2d 784 (1997); *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996); *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996).

¶3 Subsequently, Murray, Mann, Towery, and McKinney each filed a motion for post-conviction relief, arguing in part that their sentences violated their Sixth Amendment right to a jury trial because a judge, rather than a jury, determined the presence of aggravating circumstances. After the superior courts denied relief, each filed a petition for review with this court claiming various grounds for relief. We consolidated the petitioners' cases and granted review only on the issue of *Ring II*'s applicability to the petitioners' cases. We have jurisdiction under Article VI, Section 5.3 of the Arizona Constitution and Rule 32.9 of the Arizona Rules of Criminal Procedure.

II.

¶4 In *Ring II*, the United States Supreme Court held that Arizona's former capital sentencing scheme[2] violated a defendant's right to a jury trial under the Sixth Amendment because a judge, rather than a jury, found facts necessary to expose a defendant to a death sentence. 536 U.S. at ___, 122 S. Ct. at 2443. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at ___, 122 S. Ct. at 2432.[3] The petitioners request that this court vacate their death

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2. Arizona Revised Statutes (A.R.S.) § 13-703 (2001) *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

3. Recognizing that under Arizona law aggravating circumstances "operate as 'the functional equivalent of an element of a greater offense,'" the Court held that Arizona's capital sentencing scheme violates the Sixth Amendment. 536 U.S. at __, 122 S. Ct. at 2443 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19 (2000)). *Apprendi* held that a jury must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63. *Ring II* applies *Apprendi*'s (continued...)

sentences because a judge, rather than a jury, made the factual findings needed to establish aggravating circumstances.

¶5 The petitioners began these proceedings by filing a petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Generally, Rule 32.2 precludes relief for claims that were raised or could have been raised at trial or on appeal, as is true of this argument. Ariz. R. Crim. P. 32.2. An exception exists, however, when "[t]here has been a significant change in the law that *if determined to apply to the defendant's case* would probably overturn the defendant's conviction or sentence." Ariz. R. Crim. P. 32.1.g (emphasis added). Accordingly, we must first determine whether the *Ring II* decision applies retroactively to the petitioners' sentences.

III.

¶6 Several principles have shaped the United States Supreme Court's retroactivity jurisprudence, which Arizona courts have adopted and follow. *State v. Slemmer*, 170 Ariz. 174, 181-82, 823 P.2d 41, 49 (1991) (deciding to adopt and to apply federal retroactivity analysis). New constitutional rules apply to cases on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 713 (1987). The Constitution, however, neither forbids nor demands retroactive application of new rules to cases that have become final. Generally, under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality), and *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878 (1986) (per curiam), new constitutional rules do not apply retroactively.

A.

¶7 Determining whether a rule applies retroactively under the *Teague* framework involves a three-part analysis. *United States v. Sanders*, 247 F.3d 139, 146-47 (4th Cir. 2001). First, the court must determine whether the petitioner's case has become final. The second

---

3. (...continued)
interpretation of the Sixth Amendment to Arizona's capital sentencing scheme.

step essentially involves two inquiries: Is the rule that the petitioner asserts a new rule, and is the new rule substantive or procedural? Petitioners whose cases have become final may seek the benefit of new substantive rules. *Bousley v. United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 1610 (1998) (explaining that *Teague* does not apply to substantive rules). A new constitutional rule of criminal procedure, however, usually does not apply retroactively to collateral proceedings. *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075. Therefore, the court must finally determine whether the new rule fits within one of two narrow exceptions that permit retroactive application of a new rule of criminal procedure.

B.

¶8 A defendant's case becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6, 107 S. Ct. at 712 n.6. The trial courts entered a judgment of conviction and a death sentence for each of these petitioners. This court affirmed each petitioner's death sentence on his automatic direct appeal. *Murray*, 194 Ariz. 373, 982 P.2d 1287; *Mann*, 188 Ariz. 220, 934 P.2d 784; *Towery*, 186 Ariz. 168, 920 P.2d 290; *McKinney*, 185 Ariz. 567, 917 P.2d 1214. The United States Supreme Court denied petitions for writs of certiorari filed by Mann, Towery, and Murray. *Mann v. Arizona,* 522 U.S. 895, 118 S. Ct. 238 (1997) (mem.); *Towery v. Arizona*, 519 U.S. 1128, 117 S. Ct. 985 (1997) (mem.); *Murray v. Arizona*, 519 U.S. 874, 117 S. Ct. 193 (1996) (mem.). McKinney did not seek review from the Supreme Court, and his time for doing so has expired. This court has issued the direct appeal mandate for each petitioner. Accordingly, each petitioner's case has become final.

C.

¶9 Because the petitioners' cases are final, we next examine whether *Ring II* announced a new rule and whether the rule is substantive or procedural. A new rule "breaks new ground or imposes

a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. Stated differently, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Clearly, the *Ring II* decision breaks new ground because it expressly overruled *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990). *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. In *Walton*, the Court rejected Walton's argument that the Sixth Amendment demands that a jury, rather than a judge, find the presence of aggravating circumstances and upheld Arizona's capital sentencing statute, the same statute as that struck down in *Ring II*. 497 U.S. at 647-49, 110 S. Ct. at 3054-55. Because *Walton* governed at the time the petitioners' cases became final, precedent obviously did not dictate the holding of *Ring II*. Moreover, *Ring II*'s holding that a jury must decide whether any aggravating circumstances exist also imposes a new burden on the state. Thus, we conclude that *Ring II* constitutes a new rule.

¶10 Because *Ring II* announced a new rule, determining whether it applies retroactively largely turns on whether *Ring II* established a substantive or procedural rule. *See Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001). Substantive rules determine the meaning of a criminal statute. *See Bousley*, 523 U.S. at 620, 118 S. Ct. at 1610. Decisions announcing substantive rules often address the criminal significance of certain facts or the underlying prohibited conduct. *See Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002). In contrast, procedural decisions set forth fact-finding procedures to ensure a fair trial. *Sanders*, 247 F.3d at 147.

¶11 Petitioners assert that *Ring II* announced a substantive rule because it determined the essential elements of capital murder in Arizona. They argue that *Ring II* refined the definition of an element of capital offenses, which is unquestionably a substantive decision. We disagree. Although the Supreme Court recognized that Arizona's aggravating factors operate as the functional equivalent of an element of a greater offense, *Ring II* did not announce a substantive rule.

¶12 *Ring II* extends *Apprendi*'s interpretation of the Sixth Amendment to the capital context. 536 U.S. at __, 122 S. Ct. at 2432. The Supreme Court specifically described *Apprendi* as a procedural decision: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's *procedure* is." *Apprendi*, 530 U.S. at 475, 120 S. Ct. at 2354 (emphasis added). The Court explained that New Jersey's policy behind the hate crime sentence enhancement "has no . . . bearing on this *procedural* question," that is, whether the Sixth Amendment requires a jury to determine if the defendant committed the crime motivated by hate. *Id.* (emphasis added). Courts addressing *Apprendi*'s retroactivity effect consistently conclude that *Apprendi* announced a procedural rule. *E.g., Curtis*, 294 F.3d at 843; *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir. 2001); *Sanders*, 247 F.3d at 147; *United States v. Richardson*, 214 F. Supp. 2d 844, 846 (N.D. Ill. 2002). Logic dictates that if *Apprendi* announced a procedural rule, then, by extension, *Ring II* did also. *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (explaining that the Tenth Circuit's conclusion "that *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* [*II*] announced a substantive rule").

¶13 In addition, *Ring II* changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, *Ring II* altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

D.

¶14 In the interest of finality, new rules of criminal procedure do not apply retroactively under the *Teague* framework unless (1) the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 307, 109 S. Ct. at 1073 (internal quotation marks and citation omitted) or (2) the rule announced is a watershed rule of criminal

procedure that is "implicit in the concept of ordered liberty." *Id.* at 311, 109 S. Ct. at 1076 (internal quotation marks and citation omitted). Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(A)(10).

¶15 *Ring II* clearly does not implicate the first *Teague* exception. "*Ring* [*II*] did not forbid either the criminalization of any conduct or the punishment in any way of any class of defendants." *Colwell v. Nevada*, 59 P.3d 463, 473 (Nev. 2002); *see also United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002) (stating that *Apprendi* does not implicate the first *Teague* exception); *Sanders*, 247 F.3d at 148 (same).

¶16 Accordingly, *Ring II* does not apply retroactively unless it falls under *Teague*'s second exception. Petitioners argue that *Ring II* announced a watershed rule of criminal procedure because requiring a jury to determine the existence of aggravating circumstances improves the accuracy of the trial. We disagree.

¶17 The *Teague* watershed exception actually requires two showings. First, "[i]nfringement of the rule must *seriously* diminish the likelihood of obtaining an accurate conviction." *Tyler v. Cain*, 533 U.S. 656, 665, 121 S. Ct. 2478, 2484 (2001) (internal quotation marks and citation omitted) (emphasis added). In addition, "the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Id. Ring II* does not satisfy either prong of the watershed exception.

¶18 To fall within the second *Teague* exception, *Ring II* must impose a "procedure[] without which the likelihood of an *accurate conviction* is seriously diminished." *Teague*, 489 U.S. at 313, 109 S. Ct. at 1077 (emphasis added). Requiring a jury to determine the existence of aggravating circumstances does not "increase[] the reliability of the guilt-innocence determination at all because" *Ring II*

does not affect a jury's determination of guilt or innocence. *United States v. Moss*, 252 F.3d 993, 999 (8th Cir. 2001) (concluding that *Apprendi* does not qualify under the second *Teague* exception). Rather, *Ring II* prohibits a validly convicted defendant from being exposed to the death penalty unless a jury finds the existence of certain aggravating circumstances. *See id.*

¶19 Moreover, we doubt that the pre-*Ring II* sentencing procedure *seriously* diminished the likelihood of a fair sentencing hearing. *Ring II* merely shifts the fact-finding duty from an impartial judge to an impartial jury. *See United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002) (concluding that *Apprendi* does not qualify under the second *Teague* exception); *Sanders*, 247 F.3d at 148 (same). We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge. *See Illinois v. Gholston*, 772 N.E.2d 880, 886 (Ill. App. Ct. 2002) (concluding *Apprendi* is not retroactive and stating it is unlikely a jury would have a "substantially different interpretation of the brutal and heinous nature of the crimes committed than the circuit judge"); *see also Bilzerian v. United States*, 127 F.3d 237, 241 (2d Cir. 1997) (holding that *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995), which held that materiality is a jury question, is not retroactive); *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997)(same).

¶20 Even if *Ring II* seriously improved the reliability of a defendant's conviction, the decision still would not apply retroactively to final cases. To come within the purview of the second *Teague* exception, a rule "must not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S. Ct. 2822, 2831 (1990) (explaining that preserving accuracy "looks only to half of" *Teague*'s second exception). Only a "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty" reach this watershed magnitude. *Graham v. Collins*, 506 U.S. 461, 478, 113 S. Ct. 892, 903 (1993) (internal quotation marks and citation omitted). In other words, a rule "must

implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 312, 109 S. Ct. at 1076.

¶21 We agree with the Fifth Circuit Court of Appeals that "one can easily envision a system of 'ordered liberty' in which certain elements of a crime can or must be proved to a judge, not to the jury." *Shunk*, 113 F.3d at 37 (holding that *Gaudin* does not apply retroactively). Indeed, several Supreme Court opinions support the conclusion that the right to a jury determination on the existence of aggravating circumstances does not involve a procedure so "implicit in the concept of ordered liberty" as to constitute a watershed rule. *Teague*, 489 U.S. at 311, 109 S. Ct. at 1076.

¶22 In *Ring II*, the Court explained that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, *fairness*, or efficiency of potential factfinders." 536 U.S. at __, 122 S. Ct. at 2442 (emphasis added). Moreover, the Court declined to make *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968), retroactive. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S. Ct. 2093, 2095 (1968) (per curiam). *Duncan* held that the basic Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment. 391 U.S. at 147-58, 88 S. Ct. at 1446-52. Although *DeStefano* preceded *Teague*, the Court's reasoning remains relevant under the *Teague* framework. The Court stated, "We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." *DeStefano*, 392 U.S. at 634-35, 88 S. Ct. at 2095 (quoting *Duncan*, 391 U.S. at 158, 88 S. Ct. at 1452).

¶23 The Supreme Court's decision in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), further supports our conclusion that *Ring II* does not constitute a watershed rule of criminal procedure. A jury convicted Neder of violating various tax, mail, and fraud statutes. *Id.* at 6, 119 S. Ct. at 1832. The judge, however, did not instruct the jury on the element of materiality, and the judge actually made the necessary finding of materiality. *Id.* After Neder's conviction but before Neder's case became final, the Court held in *United States v. Gaudin*, 115 S. Ct. 2310, 515 U.S. 506 (1995), that a jury must determine the question of materiality. In *Neder*, the Supreme Court recognized that the judge's failure to instruct and submit the element to the jury violated the Sixth Amendment but held that the error was subject to a harmless error analysis. *Id.* at 8-15, 119 S. Ct. at 1833-37. Moreover, holding that the failure to submit an element to a jury did not constitute a structural error, the Court necessarily concluded that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair." *Id.* at 9, 119 S. Ct. at 1833.

¶24 The petitioners' cases are similar to Neder's in that the judge did not submit the aggravating circumstance element to the jury. Consequently, it would be inconsistent with *Neder* to now find that *Ring II* is a watershed rule that "implicate[s] the fundamental fairness of the trial." *Teague*, 489 U.S. at 312, 109 S. Ct. at 1076; *see, e.g., Sanders*, 247 F.3d at 148-49 (relying on *Neder* to determine that *Apprendi* is not a watershed rule of criminal procedure); *United States v. Gibbs*, 125 F. Supp. 2d 700, 705-07 (E.D. Pa. 2000) (same).

¶25 The new rule of criminal procedure announced in *Ring II* thus does not meet either of the exceptions to *Teague*'s general rule that new rules do not apply retroactively to cases that have become final.

E.

¶26 Although most courts have adopted *Teague*'s plurality analysis to determine whether a new rule applies retroactively, Arizona also follows the analysis of *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878 (1986) (per curiam). *Slemmer*, 170 Ariz. at 182-83, 823 P.2d at 49-50. Under the *Allen* framework, courts weigh three factors to determine if a rule applies retroactively to final cases: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 478 U.S. at 258, 106 S. Ct. at 2880 (quoting *Solem v. Stumes*, 465 U.S. 638, 643, 104 S. Ct. 1338, 1341 (1984)).

¶27 We regard *DeStefano* as particularly persuasive because the Court applied these same three factors to conclude that *Duncan*, which applied the Sixth Amendment right to a jury to the states through the Fourteenth Amendment, did not apply retroactively. *DeStefano*, 392 U.S. at 633-34, 88 S. Ct. at 2095-96. If the basic right to a jury trial does not apply retroactively, then a right to a jury determination of aggravating circumstances that function essentially as elements of a greater offense also does not apply retroactively.

¶28 With respect to the purpose the new rule serves, the Court explained, "[r]etroactive effect is 'appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials.'" *Allen*, 478 U.S. at 259, 106 S. Ct. at 2880 (quoting *Solem*, 465 U.S. at 643, 104 S. Ct. at 1342). We concluded in our preceding *Teague* analysis that the *Ring II* holding is not designed to improve accuracy. *See supra* ¶¶ 18-19. Thus, the first *Allen* factor does not support applying *Ring II* retroactively.

¶29 Similarly, the justice system's good faith reliance on *Walton v. Arizona* weighs against retroactivity. In *Walton*, the Court expressly approved of Arizona's system in which the judge, not the jury, determined the presence of aggravating circumstances. 497 U.S. at 647-49, 110 S. Ct. at 3054-55. Moreover, the Court reaffirmed *Walton*'s continued viability in *Apprendi*. 530 U.S. at 496-97, 120 S. Ct. at 2366. Certainly the Arizona justice system acted in good faith in applying the holding of *Walton* until the Court overruled its decade-old decision.

¶30 Finally, applying *Ring II* retroactively would greatly disrupt the administration of justice. As recognized previously, courts must protect a victim's rights by ensuring "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(A)(10). Arizona has approximately ninety prisoners on death row whose cases have become final and who received a sentence based upon the aggravating circumstances found by the trial judge and affirmed on appeal. Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden

on Arizona's administration of justice. As in *DeStefano*, "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons" sentenced to death "by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. at 634, 88 S. Ct. at 2095. Moreover, vacating those prisoners' sentences without substantial justification would violate this court's duty under the Victims' Bill of Rights. Accordingly, we conclude that *Ring II* does not apply retroactively under *Allen*.

IV.

¶31 For the foregoing reasons, we affirm each trial court's denial of post-conviction relief for the petitioners on the basis of *Ring II*.

_____

Ruth V. McGregor
Vice Chief Justice

CONCURRING:

_____

Charles E. Jones, Chief Justice

_____

Rebecca White Berch, Justice

_____

Michael D. Ryan, Justice

Feldman, Justice, specially concurring

¶32 I agree with the result and the analysis except insofar as the court relies on its interpretation of *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). *See* opinion at ¶¶ 23-24.

_____

Stanley G. Feldman, Justice (Retired)

APPENDIX C

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JAN 12 1998

CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN,	)	No. CIV 86-584-PHX-ROS
	)	
Petitioner,	)	MEMORANDUM OF
	)	DECISION AND ORDER
vs.	)	
	)	
TERRY L. STEWART, et al.,[1]	)	
	)	
Respondents.	)	

Petitioner Warren Wesley Summerlin ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Petition raises thirteen claims. For reasons set forth herein, the Court finds that Petitioner is not entitled to federal habeas corpus relief.[2]

1. Terry L. Stewart, Director of the Arizona Department of Corrections, and Meg Savage, Warden of the Arizona State Prison, Florence Complex, are substituted pursuant to F.R.C.P. 25(D)(1).

FACTUAL BACKGROUND

In the early morning of April 29, 1981, Brenna Bailey, a branch representative for Finance America in Tempe, Arizona, left her office to visit the residence of Dora Summerlin, Petitioner's wife. Finance America had lent money for a piano to Mrs. Summerlin, and the account was delinquent. Ordinarily, upon completing such a visit, Bailey would call her office supervisor. When she failed to do so or to come back into the office, he became concerned, telephoned her boyfriend Marvin Rigsby, and gave him the address of the home Bailey was supposed to visit.

Around 5:00 p.m., Rigsby arrived at the Summerlin residence. He spoke with Petitioner, who stated that Bailey had been there but had left by 10:30 a.m. Unable to find his girlfriend, Rigsby called the police. That same evening, an anonymous caller reported that a missing "Pacific Finance" woman had been killed by a man named Warren Summerlin. The female caller told police that Summerlin had placed a rolled piece of carpet that appeared to contain a body into the trunk of his car. The caller was later identified as Petitioner's mother-in-law.

The next morning, Bailey's car was found in a parking lot located approximately one mile from Petitioner's home. A pair of women's panties, pantyhose, and shoes could be seen on the back floorboard. Detectives forced open the trunk and discovered the victim's partially-nude body alongside a crumpled bedspread soaked in blood. Her skull appeared crushed. Within the bedspread's lining, they found, among other things, green carpet tufts and pieces of spongy material.

2. In accordance with the United States Supreme Court's decision in Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997), this Court has not applied the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to this case.

Later that day, police officers executed a search warrant at Petitioner's home. They took samples of carpeting and carpet padding and seized various blood-spattered items. When a detective read the warrant to Petitioner, Petitioner stated, "I didn't kill nobody." The detective did not respond, and Petitioner asked, "Is this in reference to the girl that was at my house?" The detective replied, "What girl?", and Petitioner described the woman who had been at his home regarding his wife's piano. Shortly thereafter, Mrs. Summerlin positively identified the bedspread, and Petitioner was arrested. At the police station, Petitioner asked to speak with his wife and, in the presence of police officers, proceeded to make several incriminating statements.

PROCEDURAL HISTORY

On June 8, 1982, a jury convicted Petitioner of first degree murder and sexual assault. He was sentenced to death for the murder and to a 28-year prison term for the assault. On direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983).

On March 6, 1984, Petitioner filed his first petition for post-conviction relief in state court and amended the petition on October 12, 1984. Following an evidentiary hearing on January 28, 29, and 30, 1985, the superior court denied the petition and subsequently denied a motion for rehearing. On October 1, 1985, the Arizona Supreme Court denied review. One justice dissented, stating that he would have reduced Petitioner's sentence to life imprisonment.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on April 11, 1986, and an amended petition on June 30, 1986. The Court stayed the proceedings pending the exhaustion of Petitioner's claims in state court.

On January 20, 1987, Petitioner filed his second petition for post-conviction relief in state court. The superior court summarily denied the petition on April 29, 1987, finding its only claim without merit and precluded for failure to raise it in a timely manner. The court

also denied a motion for rehearing. No petition for review was filed with the Arizona Supreme Court.

Petitioner's third petition for post-conviction relief was filed on May 11, 1988. The superior court summarily denied the petition on June 23, 1988, finding the claims precluded or waived. Thereafter, the court denied a motion for rehearing, the Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

On July 17, 1991, Petitioner filed his fourth petition for post-conviction relief, which was amended on October 17, 1991. The superior court summarily dismissed the petition on November 19, 1991, and later dismissed a motion for rehearing. The Arizona Supreme Court denied review, and the United States Supreme Court denied certiorari.

The stay of proceedings in this Court was lifted on January 27, 1995. On November 22, 1995, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus ("Petition"). Respondents filed an Answer requesting summary dismissal, and Petitioner filed a Response.

CLAIMS DECIDED ON THE MERITS

In his Petition, Petitioner raises thirteen claims for relief. (File doc. 106.)[3] Respondents contend that all but Claims 1.1, 1.2, 1.3, and 2 are procedurally defaulted. (File doc. 117 at 7-12.) As discussed infra at pages 32-35, the Court disagrees. Therefore, all of Petitioner's claims are decided on the merits.

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3. "File doc." refers to documents in this Court's file. Exhibits A through Y are the exhibits to Respondents' Notice of Filing of State Court Record. (File doc. 17.) Exhibits AA through ZZ, AAA through MMM, and AAAA through HHHH are the exhibits submitted by Petitioner in support of his Second Amended Petition. (File doc. 106.) Exhibits AAAA through HHHH were previously stricken by order of this Court and were not considered in the determination of this matter. (See File doc. 128.) "R.O.A." refers to the state court record on appeal. "R.T." refers to the reporter's transcripts. "M.E." refers to minute entries of the state court.

Claim 1.1: Petitioner was Denied Effective Assistance of Counsel at the Withdrawal of Plea Proceeding

Petitioner contends that misconduct of his counsel, Maria Regina (now Brandon), and the prosecutor, Vincent Imbordino, violated his Sixth Amendment right to effective assistance of counsel. (File doc. 107 at 13-22.) He bases his claim on the fact that Regina and Imbordino had a one-night romantic encounter four days prior to Petitioner's withdrawal from a favorable plea agreement. (Ex. W: R.T. 1/28/85 at 117, 192.) Petitioner alleges that the affair created a conflict of interest for Regina and resulted in her improperly allowing him to withdraw from a plea to second degree murder. For the reasons discussed below, the Court finds that Petitioner did not receive ineffective assistance of counsel.

The Sixth Amendment right to counsel includes the right to counsel free from divided loyalty. Bonin v. Calderon, 59 F.3d 815, 825 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996) (citing Wood v. Georgia, 450 U.S. 261, 272, 101 S. Ct. 1097, 1104 (1981)). To prevail on a claim of ineffectiveness based on a lawyer's conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). This is a two-prong inquiry. First, a petitioner must prove an actual, not merely possible or theoretical, conflict. See Bonin, 59 F.3d at 826-27; Morris v. California, 966 F.2d 448, 455 (9th Cir. 1991). Second, a petitioner must show "that some [adverse] effect on counsel's handling of particular aspects of the trial was 'likely'." United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992) (citing Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir. 1988)). In the present case, the Court need not decide whether there was an "actual" conflict because Petitioner has

failed to establish the second prong–that counsel's representation was adversely affected by the alleged conflict.[4]

On November 17, 1981, Petitioner entered into a plea agreement in which he agreed to plead guilty to second degree murder in this case and to aggravated assault in an unrelated case. The agreement specified that he would be sentenced to the maximum 21 years for the murder and to the maximum 15 years for the assault, the terms to run concurrently with each other and with a sentence for a probation violation. (Ex. Y, vol. 1: R.O.A. 29; Ex. G: R.T. 11/18/81 at 3-4, 11.) The next day, at the initial change of plea hearing, Judge Derickson discussed with Petitioner the provisions of the plea agreement and its consequences. The court also explained to Petitioner that it wanted to review the record and presentence report before deciding whether to accept the plea agreement and that Petitioner would have an opportunity to withdraw from the plea if the court rejected the stipulation for concurrent sentences. (Ex. G: R.T. 11/18/81 at 11, 14.) After Petitioner's counsel recited in detail the evidence that the state would produce at trial, the judge addressed Petitioner:

> THE COURT: The original charge is first degree murder. Are you aware of the possible punishments that are available to the Court?

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4. Respondents argue that Cuyler is inapplicable to the type of conflict alleged here (i.e., a personal loyalty issue). (File doc. 117 at 13-16.) Relying on the Fifth Circuit's decision in Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995), they assert that Cuyler is limited to conflicts arising out of multiple or successive representation and that the more rigorous Strickland standard (deficient performance and resulting prejudice) must be met to prevail on this claim. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). It is unnecessary for this Court to determine whether the conflict at issue here is of the type contemplated in Cuyler because Petitioner has failed to show that his counsel's representation was adversely affected by it, let alone that the representation was deficient. Nonetheless, the Court notes that the Ninth Circuit has routinely applied Cuyler to non-multiple representation conflicts. See Bonin, 59 F.3d at 825 (listing such cases); see also Spreitzer v. Peters, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) (declining to follow Beets).

A. Yes.

Q. What?

A. Umm, gas chair, 25 to life, or natural life, by law, for first degree murder.

THE COURT: Two alternatives: one is the death penalty.

THE DEFENDANT: Yes, sir.

THE COURT: The second is life imprisonment, without the possibility for parole for 25 actual calendar years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: With respect to the murder charge, do you believe that, because of the evidence that the State has and that it's going to present against you, that you would likely be convicted in front of a jury and, if you were convicted, you would probably suffer a greater penalty than that which is called for in this plea agreement?

THE DEFENDANT: Yes.

(Id. at 17-18.) Judge Derickson entered Petitioner's guilty pleas but deferred acceptance of the pleas until December 18, 1981, the date set for entry of judgment of guilt and sentencing. (Ex. X: M.E. 11/18/81.)

Prior to the scheduled sentencing hearing, Petitioner filed a pro per motion to withdraw from the plea agreement and a motion for substitution of counsel. (Ex. H: R.T. 12/15/81.) A hearing on the motions was held on December 15, 1981. Petitioner explained that he had just received a psychiatric evaluation report and wanted to

withdraw from the plea agreement because it did not provide for him to receive psychiatric counseling. As for the motion to substitute counsel, he told the judge that he wanted to go "the medical way" and felt that the Public Defender's Office was too overloaded with cases to adequately investigate on his behalf. He further stated, "I've been telling Maria Regina, for a long time, I didn't want to accept the plea agreement and I feel I was coached into accepting a plea agreement . . . ." (Id. at 7.) The following exchange then occurred:

THE COURT: . . . . I don't think you've set forth sufficient grounds, in your pleadings, to require a withdrawal of the plea of guilty, because I think we set forth all of the–we went through a long proceeding on November 18 about whether this was your voluntary choice to plead guilty. I told you at the time that, if I couldn't, in good conscience, accept the plea agreement on the basis that was set forth–that being the stipulation that you receive concurrent time–that I would give you an opportunity to withdraw from the plea agreement.

. . . I can tell you that I am not going to accept the stipulation on the sentence.

Although today is not the sentencing date, you should be well aware that, on that ground, you have a right to withdraw from your plea of guilty and this matter can be set for trial to a jury on the various charges that are pending against you.

THE DEFENDANT: So, you're saying, on the 18th, if I want to withdraw from the plea agreement, I can? Is that what you're saying?

MS. REGINA: What he's saying is that he's not going to give you the 21 years. He wants to give you more than that. So you can either go with what he gives you more than that or get out of the plea and go to trial.

(Id. at 8-9.) The judge subsequently denied both motions.

Thereafter, in an attempt to salvage the plea agreement, Regina filed a motion for change of judge on the ground that Judge Derickson was biased and prejudiced against Petitioner. (Ex. W: R.T. 1/28/85 at 114-15.) The motion was argued before Judge Broomfield on December 18, 1981, and denied. (Ex. X: M.E. 12/18/81.) Later that same day, Regina and prosecutor Imbordino engaged in a one-night affair. As a result, Regina believed she should not continue to represent Petitioner, especially since Petitioner had indicated that he wanted to go to trial. (Ex. W: R.T. 1/28/85 at 117.) Although she discussed the dilemma with colleagues at work, neither she nor Imbordino informed the judge or Petitioner. (Id. at 118-20.)

Four days later, Regina appeared with Petitioner at the rescheduled sentencing hearing before Judge Derickson. (Ex. X: M.E. 12/22/81; Ex. I: R.T. 12/22/81.) The judge again informed Petitioner that he would not accept concurrent sentences and that if Petitioner still wanted to plead guilty to second degree murder and aggravated assault, he could be sentenced up to a maximum of 38-1/2 years. Petitioner stated that he wanted to withdraw from the plea agreement, and the judge reinstated his pleas of not guilty. Petitioner also made another motion for new counsel, which was denied. (Ex. I: R.T. 12/22/81 at 9.) Thereafter, the case was transferred to Judge Riddel for trial. (Ex. X: M.E. 12/24/81.)

On December 28, 1981, Regina had arranged for a hearing before Judge McCarthy (standing in for Judge Riddel) at which she intended to move to withdraw as counsel. (Ex. W: R.T. 1/28/85 at 121-22, 133-34.) However, the judge began the hearing by asking Petitioner about his dissatisfaction with counsel. (Ex. Y, vol. 2: R.O.A. 134: App. 6: R.T. 12/28/81 at 2.) Petitioner responded that he suspected the Public Defender's Office was being pressured by the victim's employer and by a newspaper. Judge McCarthy then agreed to appoint George Klink, a private practitioner, as new counsel. (Id.) At that point, Regina decided not to mention her reason for wanting to withdraw since she had already been removed from the case. (Ex. W: R.T. 1/28/85 at

123, 134.) Subsequently, the matter was reassigned to Judge Marquardt, who ultimately presided over Petitioner's trial.

Before this Court, Petitioner argues that the Imbordino affair adversely affected Regina's representation because she did not advise Petitioner of the danger of withdrawing his plea to second degree murder and failed to try to persuade him not to do so. (File doc. 107 at 16; File doc. 120 at 8.) The record belies Petitioner's claim. At the post-conviction evidentiary hearing in state court, Petitioner testified that he had wanted Regina removed from his case because she "did not want to go the medical defense way" and instead kept pushing him into the plea agreement.[5] (Ex. W: R.T. 1/28/85 at 210-11; see also Ex. H: R.T. 12/15/81 at 7.) Petitioner clearly understood the consequences of withdrawing from the plea and proceeding to trial, which was what he had sought to do, unsuccessfully, at the December 15 hearing. (See Ex. G: R.T. 11/18/81 at 17-18.) Once Judge Derickson indicated that he was going to reject the concurrent sentences provision and give Petitioner an opportunity to withdraw from the plea at the upcoming hearing, there was little doubt that Petitioner would do so. (See Ex. H: R.T. 12/15/81 at 8-9; Ex. W: R.T. 1/28/85 at 117; Ex. I: R.T. 12/22/81 at 8.) This is confirmed by Petitioner's substitute counsel George Klink who testified that Petitioner was unwilling to enter any plea agreement. (Ex. W: R.T. 1/28/85 at 151, 171.) While counsel's conduct with Imbordino on December 18, 1981, was an unfortunate occurrence, Petitioner has failed to present any evidence that it affected Regina's performance at the December 22 withdrawal of plea hearing. Habeas relief for this claim is therefore denied.

Claim 1.2: Petitioner was Denied Effective Assistance of Counsel at Trial

Claim 1.3: Petitioner was Denied Effective Assistance of Counsel at Sentencing

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5. Petitioner explained that he wanted to go to trial so that doctors could testify to his mental problems. (Ex. W: R.T. 1/28/85 at 210-11.)

Petitioner contends that counsel George Klink was ineffective at trial for failing to assert potential psychiatric defenses. Petitioner also challenges Klink's effectiveness at sentencing, claiming he failed to present substantial mitigating evidence.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89, 104 S. Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Regarding prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

In June 1981, prior to Klink's assignment as defense counsel, Petitioner was examined by two court-appointed psychiatrists, Drs. Maier Tuchler and Otto Bendheim, pursuant to Rule 11 of the Arizona Rules of Criminal Procedure. Each found him competent to stand trial and legally sane under the M'Naghten standard. (Ex. F: R.T. 7/21/81 at 4-5.) Although there was no evidence of mental disease or defect, Dr. Tuchler observed that dyslexia and illiteracy made Petitioner "functionally mentally retarded." (Ex. W: R.T. 1/28/85 at 6.) He further found that Petitioner's impulse control was extremely impaired due to an explosive-type personality disorder and that Petitioner had an anti-social personality. (Id.)

Around this same time, Dr. Leonardo Garcia-Bunuel, a psychiatrist who treated Petitioner at the Maricopa County Jail, contacted defense counsel Regina regarding a possible diagnosis of psychomotor epilepsy. Petitioner had described to Dr. Garcia-Bunuel details of the murder, particularly experiencing an intense perfume

odor, and this led Dr. Garcia-Bunuel to suspect that Petitioner may have had a temporal lobe seizure at the time of the killing. (Id. at 46-48.) Subsequently, in August 1981, Regina arranged for neurological testing by Dr. Mark Winegard. An electroencephalogram (EEG) showed some slowing in Petitioner's posterior temporal area, but was insufficient to support a diagnosis of epilepsy. CAT scans and a second EEG performed in October 1981 were normal. As a result, Dr. Garcia-Bunuel withdrew his concerns. (Id. at 131.)

Regina also secured a psychological evaluation of Petitioner from Dr. Donald Tatro in November 1981. Although concluding there was no evidence to support an insanity defense, Dr. Tatro found indications of an organic brain impairment, borderline personality disorder, and paranoid personality disorder. (Ex. Y, vol. 1: R.O.A. 95 at T2.)[6] In his opinion, Petitioner "is deeply emotionally and mentally disturbed, unaware of the motives underlying much of his behavior, and unable, because of his problems, to exercise normal restraint and control, once his highly unstable and volatile emotions are aroused." (Id.)

Ineffective Assistance at Trial

Petitioner argues that Klink's representation during trial was constitutionally deficient because he failed to independently investigate potential psychiatric defenses and failed to follow up on, or utilize, psychiatric evidence already available to him. (File doc. 107 at 23-24.) According to Petitioner, once Klink determined that Petitioner was not M'Naghten insane, he "never really considered mounting a 'state of mind' diminished capacity defense at trial in order to reduce the level

6. Because the copy of Dr. Tatro's report found in Exhibit Y is illegible in places, the Court obtained a more readable copy from the Clerk of the Maricopa County Superior Court which is filed as an exhibit concurrently with the present Order.

of offense by negating *mens rea* . . . ."[7] (File doc. 120 at 12.) Specifically, he says Klink should have presented evidence of psychomotor epilepsy and of his impulsive personality to show that the killing was not premeditated.

A. Psychomotor Epilepsy

Previous counsel Regina thoroughly investigated Dr. Garcia-Bunuel's suspicion of epilepsy. She obtained neurological testing and pursued this possible diagnosis with Dr. Bendheim, as revealed in the following letter the doctor sent to Judge Derickson in December 1981:

> We again discussed the possibility of psychomotor epilepsy, especially in view of Dr. Garcia-Bunuel's findings that this man had very vivid olfactory (smell) hallucinations preceding outbursts. I went over this whole situation again and told Miss Regina that the neurologists have been unable to find psychomotor epilepsy, although there was some slowing of the wave patterns in the temporal lobes, where psychomotor epileptic attacks usually originate.
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> While a positive electroencephalogram, which was not obtained here, would make a positive diagnosis, an essentially negative EEG does not entirely rule out the possibility of epileptic-type seizures, and for this reason I see absolutely no harm and potentially quite a bit of benefit to place this defendant on anti-epileptic, anti-seizure type medication, even though the diagnosis has not been established.

(Ex. Y, vol. 1: R.O.A. 95 at Q2.)

During post-conviction hearings, Regina testified that she met with trial counsel Klink on two or three occasions and spent a number of hours discussing her investigative efforts, including a possible insanity defense. (Ex. W: R.T. 1/28/85 at 132.) She stated that she discussed this aspect of the case with Klink "in depth," including the examinations and conclusions of all five doctors. (Id.) Klink testified that after consulting with Regina he made a tactical decision to not pursue an insanity defense due to the lack of evidence. (Id. at 176.) As for the possible diagnosis of psychomotor epilepsy, Klink did not follow up on Dr. Garcia-Bunuel's earlier suspicion because the doctor had changed his opinion and was out of the country at the time of trial. (Id. at 175.)

In assessing an attorney's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

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7. The Court observes that Arizona has long rejected the affirmative defense of diminished capacity. State v. Mott, 187 Ariz. 536, 540-41, 931 P.2d 1046, 1050-51, cert. denied, 117 S. Ct. 1832 (1997) (citing State v. Schantz, 98 Ariz. 200, 212-13, 403 P.2d 521, 529 (1965)); but see A.R.S. § 13–703(G)(1) (proof of diminished capacity as a mitigating circumstance for sentencing). The practical effect being that a defendant cannot, during trial, put forth evidence of mental disease or defect to show that he or she was incapable of forming a requisite mental state for the charged offense. Mott, 187 Ariz. at 540, 931 P.2d at 1050; Schantz, 98 Ariz. at 213, 403 P.2d at 529. However, evidence of a defendant's character trait of impulsivity does not fall into this prohibited category. Mott, 187 Ariz. at 543-44, 931 P.2d at 1053-54; State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

In State v. Christensen, the defendant sought, pursuant to Rule 404(a)(1) of the Arizona Rules of Evidence, admission of expert testimony regarding his tendency to act without reflection. The Arizona Supreme Court held that it was error to exclude such testimony because "establishment of [this character trait] tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide." Id. at 35, 628 P.2d at 583. The holding was limited, however, in that the expert could not testify to whether the defendant was acting impulsively at the time of the offense. Id. at 35-36, 628 P.2d at 583-84.

In his Petition, Petitioner appears to confuse a "diminished capacity" affirmative defense with a strategy of presenting character trait evidence to negate premeditation. Nevertheless, he refers to Christensen in his Response, and counsel argued the applicability of that case during the post-conviction hearing in state court. (See File doc. 120 at 17; Ex. W: R.T. 1/28/85 at 219.) The Court therefore assumes that Petitioner's claims of ineffectiveness relate to counsel's failure to present evidence of impulsivity rather than the failure to pursue an affirmative defense unrecognized in Arizona.

evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Having reviewed the entirety of the record, the Court finds that Klink's performance was reasonable under the circumstances. In deciding whether to pursue evidence of Petitioner's mental state, Klink was entitled to rely on the opinions of the mental health experts who had already examined Petitioner. Hendricks v. Calderon, 70 F.3d 1032, 1038 (9th Cir. 1995). At the time, none of the doctors, including Dr. Garcia-Bunuel, were able to positively diagnose Petitioner as suffering from psychomotor epilepsy. It was thus reasonable for Klink not to investigate this possibility further. Likewise, in view of the doctors' inability to make a diagnosis, Klink's decision to forgo presenting what little evidence he had of epilepsy was certainly within the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir. 1990) ("It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion."). The Court thus denies habeas relief for this claim.

B. Impulsivity

At trial, counsel's main defense theory was lack of premeditation. Klink argued to the jury that the killing may have been the result of a "violent, sudden reaction" to Brenna Bailey's visit to collect on an overdue bill. (Ex. S: R.T. 6/8/82 at 40.) Yet, he presented no evidence to support this theory, despite having the reports of Drs. Tuchler and Tatro which described Petitioner's impulsive personality and which would have been admissible under State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981). See supra note 7; Vickers v. Ricketts, 798 F.2d 369, 372 (9th Cir. 1986) ("The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation.") (citing Christensen). At the evidentiary hearing in state court, Klink was not asked why he failed to present this evidence or whether he was even cognizant of the Christensen decision, which had been handed down more than a year before Petitioner's trial. Nonetheless, even assuming for the sake of argument that Klink's

representation in this regard was deficient, Petitioner has failed to establish prejudice.

The trial court instructed the jury on both first and second degree murder and explained that a finding of premeditation differentiated the former from the latter. (Ex. S: R.T. 6/8/82 at 64.) "To prove premeditation, the state was required to show only that [the defendant] had had time to reflect after forming the intent to kill; any length of time would have been sufficient, even if it was 'as instantaneous as [the time] it takes to form successive thoughts in the mind.'" Clabourne v. Lewis, 64 F.3d 1373, 1380 (9th Cir. 1995) (citing State v. Neal, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). In its closing argument, the State asserted that evidence of sexual assault established premeditation because Petitioner would have had to get up after assaulting the victim to retrieve the hard, blunt object used to fracture her skull."[8] (Ex. S: R.T. 6/8/92 at 19.) The prosecutor also emphasized that the number of blows to the victim's head showed that Petitioner had had time to reflect on his actions. (Id.)

After careful review of the record, the Court finds that there is no reasonable probability the jury would have acquitted Petitioner of first degree murder had Klink introduced evidence of Petitioner's impulsive personality. The doctors would not have been allowed to testify that Petitioner was acting impulsively at the time of the murder. The testimony would have been limited to a general description of Petitioner's behavioral tendencies and thus would have had only marginal probative value in determining whether Petitioner lacked premeditation at the time of the offense. See Christensen, 129 Ariz. at 35-36, 628 P.2d at 583-84. In addition, the State presented considerable evidence of sexual assault,[9] and the jury found Petitioner guilty on that

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8. Although the murder weapon was never recovered, Petitioner confessed to Dr. Tatro that he had struck the victim with a hatchet. (Ex. W: R.T. 1/28/85 at 74-75.)

9. The victim's underwear and pantyhose, torn and spattered with blood, were found in the backseat of her car, along with her shoes. (Ex. P: R.T. 6/2/82 at 154.)
(continued...)

charge. Furthermore, uncontroverted testimony established that the victim had been hit repeatedly and forcefully on different sides of her head.[10] Petitioner's "excessive and purposeful actions demonstrate more than just a 'reactionary' homicide." State v. Summerlin, 138 Ariz. at 434, 675 P.2d at 694. Cf. State v. Lopez, 158 Ariz. 258, 263, 762 P.2d 545, 550 (1988) (nature, severity, and placement of injuries, several of which would have individually caused death, demonstrated premeditation); State v. Sellers, 106 Ariz. 315, 316, 475 P.2d 722, 723 (1970) (same). Habeas relief is denied.

Ineffective Assistance at Sentencing

Petitioner also asserts that Klink was ineffective at sentencing for failing to investigate and present evidence of Petitioner's social and psychological history, including an incapacity to conform his conduct to the law's requirements. (File doc. 107 at 27-31.) The Court disagrees.

During the aggravation/mitigation hearing, Klink called Dr. Tatro as the sole mitigation witness. The following then occurred:

THE COURT: All right. Come forward and be sworn, please.

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9. (...continued)
When police discovered the body, Bailey's dress and slip were pulled up to her mid-section and she was nude from the waist down. (Id. at 166-67.) In addition, one detective observed a milky substance, which appeared to him to be seminal fluid, around her genitals. (Id. at 176, 178.) Later testing of a vaginal swab confirmed the presence of seminal fluid, and other evidence effectively eliminated Bailey's boyfriend as the source. (Id. at 114; Ex. R: R.T. 6/7/82 at 88-95, 133-36, 153-56.)

10. The medical examiner who performed the autopsy testified that there were at least five lacerations on Bailey's scalp, with some appearing to be compound (i.e., more than one blow to the same area). (Ex. R: R.T. 6/7/82 at 156.) These injuries were located all over the victim's head–on the right forehead, behind the left ear, on the top, and on the back. (Id. at 158-59.) The medical examiner further testified that several of the blows individually would have been fatal. (Id. at 163.) Additionally, there was a defensive wound on the back of the victim's right hand, indicating that she probably tried to protect her head during the assault. (Id. at 161-62.)

Your client wants to ask a question.

MR. KLINK: Well, your honor, may we approach the bench?

THE COURT: All right.

(An off the record discussion at the bench ensued, outside the hearing of the court reporter.)

THE COURT: At the request of defense counsel and his client, the client would like to have a couple of minutes to talk over the calling of this witness.

. . . .

MR KLINK: All right, your honor. With the consent of the defendant, the defendant has no witnesses in mitigation at this time and -

THE COURT: This will be -

MR. KLINK: - and we'll rest.

. . . .

MS. GIFFORD: Your honor, it's my understanding - at least my impression - that this is the defendant's decision that he does not wish certain witnesses to be called. Could we have that reflected on the record, perhaps, because -

THE COURT: I think it has been, and Mr. Summerlin, I'll address you directly, to make sure that–for any error that might possibly be claimed at this time–to make sure that you understand that you are facing a potential decision between either life

imprisonment or the death penalty, and this is the time in which you must decide whether you present any mitigation witnesses on your behalf.

This is your entitlement. Your lawyer has told me that at this time you do not wish to, and he is telling me that you do not wish to call any mitigation witnesses. If this is correct I'll accept your decision.

But I want it to be very clear that this is the time, and only time, that you'll be able to have to do this.

So you don't even need to respond to me. You understand what I'm telling you?

THE DEFENDANT: Yes.

(Ex. T: R.T. 7/8/82 at 7-10; emphasis added.) Defense counsel subsequently clarified that Petitioner wished to rely on Dr. Tatro's evaluation, which had been appended to the presentence report. Thereafter, the State called Drs. Bendheim and Tuchler as rebuttal witnesses.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. At the post-conviction evidentiary hearing, Klink testified that he could not remember the substance of his consultation with Petitioner during the aggravation/mitigation hearing or why Dr. Tatro was not utilized as a witness. (Ex. W: R.T. 1/28/85 at 182–83.) Nevertheless, it is clear from the record that it was Petitioner who did not want the doctor to testify.[11]

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11. In light of Petitioner's detailed confession to Dr. Tatro, it is possible Petitioner preferred submission of the doctor's report, which had been redacted in an apparent effort to remove any reference to the confession, to the risk of a potentially (continued...)

Furthermore, this is not a case in which counsel, on notice that his client may be mentally impaired, failed altogether to investigate and present evidence of his client's mental condition. See Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995); Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989), vacated on other grounds, 500 U.S. 901, 111 S. Ct. 1678 (1991); Evans v. Lewis, 855 F.2d 631, 636–37 (9th Cir. 1988). Here, Klink put forth evidence that in his view showed that Petitioner's capacity to conform his conduct to the requirements of law was substantially impaired. See A.R.S. § 13-703(G)(1). (Ex. W: R.T. 1/28/85 at 181.) Specifically, the sentencing court was informed, via Dr. Tatro's report, that Petitioner's emotionally and mentally disturbed condition contributed to an inability to control his behavior. (Ex. Y, vol. 1: R.O.A. 95 at T2.) In addition, on cross-examination, Klink elicited from Dr. Tuchler the opinion that Petitioner could lose control if his explosive personality was triggered. (Ex. T: R.T. 7/8/82 at 23–24.) That neither the sentencing court nor the Arizona Supreme Court found this evidence sufficient to establish the diminished capacity mitigating factor has no bearing on the reasonableness of counsel's performance.

Petitioner has also failed to establish that he was prejudiced as a result of Klink's allegedly deficient representation at sentencing. Significantly, Petitioner does not point to any evidence of his mental condition that should have been submitted other than the possibility he suffered a psychomotor epileptic seizure at the time of the killing. However, as discussed previously, counsel's decision to forgo further pursuit of such evidence was reasonable under the circumstances. At that time, none of the experts were able to positively diagnose Petitioner as suffering from psychomotor epilepsy, and Klink was entitled to rely on their opinions. See Dyer v. Calderon, 122 F.3d 720, 736 (9th Cir. 1997); Hendricks, 70 F.3d at 1038. Even at the post-conviction evidentiary hearing. Dr. Garcia-Bunuel could not affirmatively opine whether Petitioner had experienced an epileptic

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11. (...continued)
damaging cross-examination.

seizure at the time of the killing.[12] Moreover, this possible diagnosis was brought to the sentencing court's attention through Klink's cross-examination of Dr. Bendheim during the aggravation/mitigation hearing. (Ex. T: R.T. 7/8/82 at 17–19.)

As for Klink's failure to interview Petitioner's family members or otherwise investigate Petitioner's background, Petitioner has again failed to establish that such efforts would have changed the sentencing outcome. The state court conducted a full and fair fact-finding hearing into this claim of ineffective assistance of counsel.[13] Yet, Petitioner produced no new mitigating evidence. In addition, much of the information Petitioner now claims was never presented in mitigation was in fact contained in Dr. Tatro's report, including Petitioner's learning disabilities and organic brain dysfunction, as well as his troubled childhood and feelings of being unloved and unwanted by his mother. (See Ex. Y, vol. 1: R.O.A. 95 at T2–Z2.) Thus, even assuming Klink's failure to investigate Petitioner's social history fell

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12. Dr. Garcia-Bunuel testified as follows:

> Mr. Summerlin may claim that he never sexually assaulted the victim that he killed. If Mr. Summerlin is telling the truth in that respect, then my answer to the question would be, essentially, unqualified yes, he almost certainly acted as a result of the temporal lobe seizure.
>
> If Mr. Summerlin is not telling the truth—did not tell me the truth and, in fact—and I have no way of establishing that—did sexually assault the victim prior to the killing, then my answer would be that it was not very likely he had a temporal lobe seizure at that time
>
> . . . .
>
> . . .
>
> Clearly, one would have to assume that if there was a sexual assault the victim would have resisted, it would not have lasted a fraction of a second, and it would have been terminated. The murder that followed would have had a different motivation and cause then.

(Ex. W: R.T. 1/28/85 at 57–58.)

13. The Court made this finding in its July 18, 1996 Order granting Respondents' Motion to Strike Petitioner's Exhibits AAAA through HHHH. (See File doc. 128.)

outside the wide range of reasonable assistance, Petitioner has not met his burden of proving prejudice. Petitioner is not entitled to habeas relief.

Claim 1.4: Cumulative Errors of Counsel Prejudiced Petitioner.

Petitioner next asserts that the combined impact of alleged deficiencies in counsel's representation prejudiced his defense. As already discussed, however, Petitioner has failed to show, in most of his ineffective-assistance-of-counsel claims, that counsel's performance was deficient, let alone prejudicial. This claim is therefore denied. Cf. Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (petitioner prejudiced by cumulative impact of eleven deficiencies, eight of which were undisputed).

Claim 2: Petitioner's Due Process Rights were Violated by the Trial Court's Incompetence/Impairment

In 1991, Judge Marquardt pled guilty to a felony involving marijuana and admitted suffering from an addiction to the drug. Petitioner contends that this admitted drug use establishes Judge Marquardt was incompetent to preside over Petitioner's pre-trial, trial, sentencing, and post-conviction proceedings.[14] (File doc. 107 at 33–67.) Although he points to several passages in the record that in his view evidence impairment, Petitioner urges the Court to look beyond the record, conduct an evidentiary hearing into the extent of Judge Marquardt's drug dependency, and evaluate this claim as if it were one of judicial bias. See, e.g., Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444 (1927) (pecuniary interest in outcome of judgment); Scott v.

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14. Respondents concede that Judge Marquardt used marijuana during the relevant time period. (File doc. 117 at 31.)

United States, 559 A.2d 745 (D.C. App. 1989) (appearance of impropriety). The Court declines to do so.[15]

In reviewing a claim of judicial incompetence, the appropriate inquiry is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1995). Petitioner points to several parts of the record to substantiate his allegation that Judge Marquardt's ability to "perceive, comprehend, reason, and judge" was impaired. (File doc. 107 at 39–62.) Specifically, he cites to the judge's need for clarification of the facts during a pre-trial suppression hearing (see Ex. N: 5/11/82 at 37–38), alleged mistakes during voir dire (see Ex. O: 6/1/82 at 22, 32–34), reversal of an evidentiary ruling (see Ex. Q: 6/3/82 at 38–40), "misleading" advice regarding mitigation evidence (see infra Claim 5), allegedly erroneous aggravating and mitigating findings (see File doc. 107 at 46–55), and failure to find, during post-conviction proceedings, that counsel had been ineffective at trial and sentencing (see id. at 55–62). This Court carefully reviewed the entire state court record, with an emphasis on the passages referenced by Petitioner. None demonstrate that Judge Marquardt was impaired or that Petitioner was denied a fundamentally fair trial. This claim is wholly without merit and is therefore denied.

Claim 3.1: Petitioner was Entitled to a Jury Determination of the Factual Issues Constituting Aggravating Factors

Arizona Revised Statutes § 13-703(B) provides that the determination of aggravating factors shall be heard "before the court alone" without a jury. Petitioner argues that the Sixth, Eight, and Fourteenth Amendments require a jury determination of aggravating factors because such factors are essentially elements of first degree

15. Petitioner's request for funds to investigate the nature and extent of Judge Marquardt's drug usage was previously denied by the Court in its September 27, 1995 Order. (See File doc. 93.)

murder. The United States Supreme Court rejected this same argument in Walton v. Arizona, 497 U.S. 639, 647–49, 110 S. Ct. 3047, 3054–55 (1990). Claim 3.1 is denied.

Claim 3.2: Arizona's Death Penalty Statute Imposes an Improper Burden and Standard of Proof at Sentencing.

This claim lacks merit. In Walton v. Arizona, 497 U.S. 639, 649–51, 110 S. Ct. 3047, 3055–56, the United States Supreme Court rejected the petitioner's argument that the Arizona death penalty statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Habeas relief is therefore denied.

Claim 3.3: The Aggravating Factor of Especially Heinous, Cruel, or Depraved is Unconstitutionally Broad and is Unconstitutional as Applied to Petitioner.

Petitioner argues that the Arizona Supreme Court has failed to construe the "especially heinous, cruel, or depraved" aggravating factor in a manner that adequately channels the sentencer's discretion. However, the United States Supreme Court has held otherwise. See Richmond v. Lewis, 506 U.S. 40, 50–51, 113 S. Ct. 528, 536 (1992); Walton v. Arizona 497 U.S. 639, 652–55, 110 S. Ct. 3047, 3056–58 (1990). Therefore, Petitioner's argument has no merit.

Petitioner also asserts that the especially heinous, cruel or depraved factor, A.R.S. § 13–703 (F) (6), was arbitrarily applied in his case. Whether a state court correctly applied an aggravating factor to the facts is a question of state law. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990). Therefore, federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. Id. The appropriate inquiry is "whether, after

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). A habeas court faced with a record of historical facts which supports conflicting inferences must presume (even if it does not appear in the record) that the trier of fact resolved any such conflicts in favor of the prosecution. Id. at 326, 99 S. Ct. at 2793.

In finding the (F) (6) aggravating factor in the present case, the sentencing court stated the following in its Special Verdict:

> The killing was cruel. The victim received a defensive blow to her right hand. The victim suffered pain and mental terror during and prior to this blow. She experienced mental terror while being raped by the defendant and obviously experienced mental terror after the rape and during her murder, as she tried to defend herself.
>
> The Killing was also heinous and depraved. Focusing on defendant's mental state, the evidence showed he literally crushed the victim's skull from all sides after he raped her. This was a heinous and depraved murder.

(Ex. Y, vol. 1: R.O.A. 92 at 1–2.) The Arizona Supreme Court independently reviewed the sentencing court's findings and agreed that the murder was committed in both an especially cruel and especially heinous or depraved manner. State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983).

Under Arizona law, cruelty is defined as the pain and suffering, including mental distress, of a conscious victim prior to death. State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the victim

suffered both mental and physical pain as a result of being raped and bludgeoned by Petitioner.

Heinousness and depravity focus on the defendant's state of mind and can be satisfied by a showing that the defendant inflicted gratuitous violence on the victim beyond that necessary to kill, needlessly mutilated the victim's body, relished the murder, or senselessly killed. State v. Gretzler, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). Helplessness of the victim is also a factor that can be considered. Id. Viewing the evidence in a light most favorable to the State, a rational fact-finder could find beyond a reasonable doubt that the excessive number of blows to the victims's head constituted gratuitous violence and needless mutilation, that the victim was helpless, and that the killing was senseless. Petitioner is not entitled to habeas relief on Claim 3.3.

Claim 3.4: Arizona's Death Penalty Statute is Impermissibly Mandatory in Nature.

Arizona Revised Statutes § 13–703 (E) provides that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found insufficient to call for leniency. Petitioner claims that the statute creates a mandatory "presumption of death" and does not permit the sentencer to decide the appropriateness of the death penalty in an individual case, thus violating the Constitution. This precise claim was rejected by the United States Supreme Court in Walton v. Arizona, 497 U.S. 639, 651–52, 110 S. Ct. 3047, 3056 (1990). Habeas relief on this ground is denied.

Claim 4: Petitioner was Denied a Fair Opportunity to Present Mitigation

Petitioner asserts that counsel's ineffectiveness at sentencing constitutes an independent due process violation in that Petitioner was deprived of the opportunity to present mitigating evidence–in particular,

psychiatric testimony regarding his mental state. For the reasons discussed regarding Claim 1.3, this claim lacks merit and is denied.

Claim 5: The Trial Court Improperly Advised Petitioner Regarding the Consequences of Not Presenting Mitigation Evidence.

As already discussed in relation to Claim 1.3, Petitioner chose to not present mitigation witnesses at the aggravation/mitigation hearing. In response, the trial court stated:

> I think probably it would also be fair for me to tell you, just to make sure we understand each other, that under the statutes and under the code that I operate under in Arizona, there are a list of aggravating factors, and a list of mitigating factors that have to be determined.
>
> Those factors-certain aggravating factors have been presented to my by the State of Arizona. If I find any one of those aggravating factors to exist—if I find an absence of—or no mitigating factors—then I'm authorized to give the maximum penalty, which can be the death penalty.

(Ex. T: R.T. 7/8/82 at 10.) Petitioner argues that this was incorrect and misleading advice since A.R.S. § 13–703 (E) dictates that the trial court "shall impose" the death penalty if one or more aggravating circumstances are found and mitigating circumstances are found insufficient to call for leniency. Petitioner, however, fails to allege how these remarks amounted to a violation of federal law. See Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S. Ct. 475, 480 (1991) ("[I]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). Furthermore, he makes no claim that he was in fact misled or that his attorney failed to advise him of the consequences of not presenting sufficient mitigating evidence. Moreover, the trial court

emphasized the importance of presenting mitigation evidence if Petitioner hoped to avoid the death penalty. Petitioner's claim is denied.

Claim 6: The Trial Court Improperly Considered a victim Impact Statement

Claim 7: The Trial Court Improperly Considered a Presentence Report that Contained Irrelevant and Inadmissible Statements

Petitioner argues that a victim impact statement, letters from the victim's relatives and friends, and a petition with approximately 500 signatures constituted irrelevant sentencing information that violated his rights under the Eighth Amendment.[16] Petitioner also complains that that presentence report contained inadmissible speculation and hearsay. Specifically, the probation officer who prepared the presentence report included in it her opinions regarding the crime. The following is an excerpt:

> The instant offense was a senseless and brutal attack of an innocent young woman whose only mistake, if any, was being in the wrong place at the wrong time. What mentel [sic] terror and trauma the victim felt throughout her ordeal, will never be known, however, any reasonable individual can assume it was beyond comprehension. Her attempts to struggle for her life ended as the defendant viciously and repeatedly beat her head with a blunt instrument.
>
> . . . .

16. Relying on Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), Petitioner challenges all o the victim-related evidence, including the impact of the crime on the family, opinions about the defendant, and sentencing recommendations. He acknowledges, however, that Booth's per se bar on victim impact evidence was overtured by the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991). Nevertheless, the admission of family members' opinions and characterizations about the crime, the defendant, and the appropriate sentence remains constitutionally impermissible. Id. at 830 n.2, 111 S. Ct. at 2611 n.2.

> This writer is of the opinion the defendant represents a grave threat not only to women, but to all of society. This writer further believes that the taking of a human life is the ultimate crime and in the manner in which it occurred, the defendant should be dealt the most severe penalty possible.

(Ex. Y, vol. 1: R.O.A. 95 at 7–8.)

Absent proof to the contrary, state courts are "presumed to know the law and to apply it in making their decisions." Walton v. Arizona, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057 (1990). See also Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994) ("[W]e presumed state courts follow the law, even when they fail to so indicate."); Paradis v. Arave, 20 F.3d 950, 956–57 (9th Cir. 1994) (petitioner failed to show that the trial judge relied on hearsay statements in arriving at the sentencing decision); Gerlaugh v. Lewis, 898 F. Supp. 1388, 1423-24 (D. Ariz. 1995) (same). Petitioner has failed to show that the trial court actually relied on inadmissible or irrelevant evidence when it imposed the death sentence. The court read the presentence report, but its findings do not indicate that it based the sentence on any of the information complained of by Petitioner. (See Ex. Y, vol. 1: R.O.A. 92; Ex. U: R.T. 7/12/82 at 9–2). Claims 6 are 7 are denied.

PROCEDURAL BAR

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1059 (1989). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which the claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982);

Picard v Connor, 404 U.S. 270, 277–78, 92 S. Ct. 509, 513 (1971).[17]

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, he has "technically" exhausted the claims. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 1570 n.28 (1982)). However, the federal court may not review the claims on the merits unless the petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or shows that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992); Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S. Ct. at 1572–73.

In the present case, Respondents argue that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are procedurally barred in federal court because the state court found them procedurally defaulted when it ruled on Petitioner's third petition for post-conviction relief.[18] (File doc. 117 at 7; Ex. UU: M.E. 6/23/88.) In Harris v. Reed, 489 U.S. 255, 263–64,

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17. Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

18. Claim 5 was initially raised as the sole issue in Petitioner's second petition for post-conviction relief. (Ex. II.) The trial court ruled that it was precluded for failure to raise it within one year of the date of mandate. (Ex. KK: M.E. 4/29/87.) The court further found that the claim lacked merit. (Id.) The court's preclusion ruling was based presumably on A.R.S. § 13–4232(A)(4), cited in the State's Response to Petition for Post-Conviction Relief. (Ex. JJ at 2.) Petitioner did not petition the Arizona Supreme Court for review. Subsequently, section (A)(4) of A.R.S. § 13–4232 was declared unconstitutional. State v. Bejarano, 158 Ariz. 253, 762 P.2d 540 (1988); State v. Fowler, 156 Ariz. 408, 752 P.2d 497 (App. 1987). Petitioner then re-raised Claim 5 in his third petition for post-conviction relief. (Ex. RR.)

n.10, 109 S. Ct. 1038, 1043–44, n.10 (1989), the United States Supreme Court held that federal courts will recognize a procedural default if the state court "clearly and expressly" states that its judgment rests upon a procedural bar, even if the state court makes an alternative ruling on the merits. See also Carriger v. Lewis, 971, F.2d 329, 333 (9th Cir. 1992) (holding claim was procedurally defaulted when state court denied claim on procedural grounds and alternatively on the merits). However, if the state court did not actually rely independently on the bar, but instead rejected Petitioner's claim on its merits or on the combined weight of Petitioner's default on the claim's merits, a federal court "implies no disrespect for the State by entertaining the claim." County Court of Ulster County, N.Y. Allen, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223 (1979). See also Siripongs v. Calderon, 35 F.3d 1308, 1316–17 (9th Cir. 1994) (state court order failed to independently rely on state bar when it denied petition "both for reasons of procedural default and on the merits" and did not identify any particular procedural rule that completely barred any of the petitioner's claims).

In denying Petitioner's third petition, the state court ruled as follows:

> Defendant's Third Petition for Post-Conviction Relief is summarily denied. For the reasons stated in the State's Response and adopted by this Court, the issues raised are precluded or waived.

(Ex. UU: M.E. 6/23/88.) The State's Response, however, does not add clarity to the court's ambiguous ruling. Specifically, the State first argued that some of the claims were precluded because they had been previously adjudicated on the merits either in the first petition for post-conviction relief or on direct appeal. (Ex. SS at 3–4.)[19] It subsequently stated that "all the issues raised in the present petition" are waived "because each issue existed at the time of the appeal, but was not raised." (Id. at 5; emphasis in original.) The trial court's wholesale

19. If claims are held "precluded" because they already have been decided on the merits, there is no bar to federal habeas review.

adoption of the State's internally-inconsistent Response does not provide a clear basis for finding that the judgment rests upon procedural default grounds. See Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996) (state court did not clearly base ruling on independent and adequate state grounds when it adopted state's mixed arguments of preclusion and waiver). Therefore, the relevant claims have been decided on the merits by this Court.

Respondents also contend that Claims 1.4, 3.1, 3.2, 3.3, 3.4, 4, 5, 6, and 7 are not "exhausted" because the Arizona Supreme Court summarily denied review of the trial court's ruling on the third petition for post-conviction relief. (File doc. 117 at 9–10; Ex. AAA.) They assert that because the trial court's procedural default rulings were left "intact," the merits of the claims have never been "fairly presented" to the state's highest court. The Court disagrees. Exhaustion does not require that the state's highest court rule on a claim's merits. Here state supreme court review is discretionary, a petitioner need only seek such review in order to exhaust state remedies. Roberts v. Arave, 847 F.2d 528, 529–30 (9th Cir. 1988). The Court further disagrees with respondents' assertion that Claim 1.4 was not raised in any sate court. (File doc. 117 at 10.) It was included in Petitioner's third petition for post-conviction relief. (See Ex. RR at 9–12.)

CONCLUSION

All of Petitioner's claims are denied on the merits. In addition, the Court finds that Petitioner is not entitled to an evidentiary hearing.

Accordingly,

IT IS ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto **[file docs. 1, 23, 106]**.

IT IS FURTHER ORDERED vacating the stay of execution previously entered by the Court **[file doc. 13]**.

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Order to all counsel of record.

IT IS FURTHER ORDERED that the Clerk of the Court file Dr. Tatro's 7-page report (received from the Clerk of the Maricopa County Superior Court) as an exhibit to this case.

Dated this 31 day of October, 1997.

S/_____
Roslyn O. Silver
United States District Judge

Copies to all counsel of record

APPENDIX D

__X__ FILED ___LODGE
_____ RECEIVED ___COPY

JAN 12 1998

CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

BY_____DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN, PETITIONER, –vs– TERRY L. STEWART, et al., RESPONDENTS.	CIV 86–584–PHX–ROS ORDER

Pending before the Court is Petitioner's Motion for New Trial filed pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure. Petitioner requests that the Court vacate its Order of November 13, 1997, which denied Petitioner's petition for writ of habeas corpus. Respondents have filed an opposition.

Petitioner's motion is in essence a motion for reconsideration. Motions for reconsideration are appropriate only in rare circumstances. Sullivan v. Faras-RLS Group, Ltd., 795 F.Supp. 305, 308–09 (D. Ariz. 1992).

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983); see also Defenders of Wildlife v. Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F. 2d 906, 909 (3d Cir. 1985). A motion for reconsideration should not be used to ask a court "to rethink what the court had already thought through–rightly or wrongly." Above the Belt, Inc., 99 F.R.D. at 101. Such arguments should be directed to the court of appeals. Sullivan, 795 F. Supp. at 309.

In regard to his claim that counsel Maria Regina was ineffective at the December 22, 1981 withdrawal of plea hearing due to an alleged conflict of interest which arose four days earlier, Petitioner asserts that the Court incorrectly applied the standard announced in Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). Specifically, Petitioner argues that the court performed an "actual prejudice" analysis rather than an analysis of the likely adverse effect of counsel's conflict on her performance. See United States v.

Miskinis, 966 F. 2d 1263, 1268 (9th Cir. 1992); File doc. 129 at 5–11.[1] The Court disagrees.

In an Order filed November 13, 1997, this Court stated, "Petitioner has failed to present any evidence that [the alleged conflict of interest] affected Regina's performance at the December 22 withdrawal of plea hearing." (File doc. 129 at 11.) This finding was based, in part, on Petitioner's statements at the December 15, 1981 hearing on his *pro se* motion to withdraw from plea agreement and motion for substitution of counsel, and his testimony at the state post-conviction evidentiary hearing. Specifically, Petitioner felt that Regina had "coached" him into accepting a plea agreement, and he wanted her removed from his case because she kept pushing him to accept the plea. (Ex. H: R.T. 12/15/81 at 7; Ex. W: R.T. 1/28/85 at 211.) Petitioner also indicated at the December 15, 1981 hearing that he understood withdrawal of his plea meant he would go to trial on the original charges. [2]

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1. "File doc." refers to documents in this Court's file.
2. The following exchange took place at the December 15, 1981 hearing:

> THE COURT: Do you understand that [withdrawing your plea] would involve you going to trial on the original charges in this case and the probation violation? There aren't going to be any agreements between the State and the defense on what the sentence might be, if you're convicted. Do you understand that?
>
> THE DEFENDANT: Yes, I understand that. But, see, I also understand that I am—I'm deciding to go the—what they call the medical way. I would like to go the medical way to my case, but I'm having a difficulty with counseling on the medical way.

(Ex. H: R.T. 12/15/81 at 4–5.)

Petitioner's claim in the instant motion that there "was a possibility that [Regina] could persuade him to reconsider withdrawing the plea" or that other counsel may have been able to talk Petitioner out of his desire to withdraw is simply speculation, unsupported by the record. (Motion at 5.) Regina's testimony at the post-conviction hearing established that, following the December 18, 1981 encounter with the prosecuting attorney, she believed she should withdraw from Petitioner's case *because he wanted to go to trial.* (Ex. W: R.T. 1/28/85 at 117.) No evidence was presented that Regina was likely incapable of properly advising Petitioner of the consequences of withdrawing his plea. Consequently, Petitioner failed to show that Regina's performance at the December 22 withdrawal of plea hearing was likely affected in an adverse way by the alleged conflict of interest.

The remainder of Petitioner's motion raises the same arguments and issues previously considered and decided by the Court. It does not present newly discovered evidence nor identify manifest errors of law or fact.

For the above-stated reasons,

IT IS ORDERED denying with prejudice Petitioner's Motion for New Trial **[file doc. 132]**.

DATED this 9 day of January, 1998.

ROSLYN O. SILVER
United States District Judge

Copies to all counsel of record.

(2)

No. 03-526

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of elements of the greater offense of capital murder and that the Sixth Amendment therefore requires they be found by a jury. The United States Court of Appeals for the Ninth Circuit applied *Ring* retroactively in Respondent Warren Summerlin's federal habeas corpus proceeding.

The question presented is whether, under this Court's retroactivity jurisprudence, *Ring* applies to the federal habeas corpus proceeding of an Arizona prisoner under a sentence of death whose direct appeal became final prior to this Court's ruling in *Ring*.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On July 12, 1982, a judge of the Maricopa County Superior Court sentenced Respondent Warren Summerlin to death for his conviction on one count of first-degree murder. Pursuant to the Arizona capital sentencing statute in effect at the time, *see* Ariz. Rev. Stat. § 13-703 (1981), *amended by* Ariz. Rev. Stat. §§ 13-703 and 13-703.01 (2002), the judge imposed the sentence of death following a sentencing hearing in which he sat as the finder of fact on the existence of aggravating and mitigating circumstances. As aggravating circumstances, the judge found that (1) Mr. Summerlin had a prior felony conviction involving the use or threatened use of violence on another person; and (2) Mr. Summerlin committed the offense in an especially heinous, cruel, or depraved manner. The judge found no mitigating circumstances.

On his direct appeal to the Arizona Supreme Court, Mr. Summerlin argued, among other things, that Arizona's death penalty statute violated the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution because it denied him the right to have a jury determine the factual questions that led to the imposition of the death penalty. Excerpt of Record before the United States Court of Appeals for the Ninth Circuit, Volume III, Exhibit 40 (excerpt from Mr. Summerlin's opening brief to the Arizona Supreme Court on direct appeal). Inaccurately describing Mr. Summerlin's argument as a challenge to the constitutionality of a system that permitted the trial judge to "determine whether to impose the death penalty," the state supreme court rejected the argument by citing to this Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), which reaffirmed the principle that jury *sentencing* is not

constitutionally required. *State v. Summerlin*, 138 Ariz. 426, 435, 675 P.2d 686, 695 (1983).

The Arizona Supreme Court affirmed Mr. Summerlin's convictions and sentences on November 21, 1983. Mr. Summerlin filed a timely motion for reconsideration, which the state supreme court denied on January 18, 1984. His convictions and sentences became final on April 17, 1984, when the time for seeking review by this Court elapsed.

In *Ring v. Arizona*, this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of elements of the greater offense of capital murder and that the Sixth Amendment therefore requires the aggravating circumstances be found by a jury. 536 U.S. 584, 609 (2002). *Ring* thus validated the argument Mr. Summerlin had presented to the Arizona Supreme Court twenty years earlier.

Mr. Summerlin's appeal from the United States district court's denial of his petition for writ of habeas corpus was pending before the United States Court of Appeals for the Ninth Circuit when this Court issued its ruling in *Ring*. Following *Ring*, the court of appeals ordered that Mr. Summerlin's appeal be heard by an *en banc* panel of the court to resolve the question of *Ring*'s retroactive application.

In its opinion, the court of appeals clarified the issue underlying the retroactivity determination:

> In short, now that the Supreme Court has decided that Timothy Ring's capital murder conviction must be vacated because the judge was constitutionally disqualified from deciding whether Ring was eligible for the death penalty,

> the question is whether others who received the same constitutionally infirm sentence, including those who previously raised the identical issue, are eligible for the same relief or whether they should remain subject to execution.

Pet. App. A-24; *Summerlin v. Stewart*, 341 F.3d 1082, 1096-97 (9th Cir. 2003) (footnote omitted).

The court held that *Ring* applies retroactively to federal habeas corpus proceedings. Specifically, it held that the rule announced in *Ring* was one of substantive criminal law, and was therefore exempt from the retroactivity analysis applied to new rules of constitutional criminal procedure pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *See* Pet. App. A-32; *Summerlin*, 341 F.3d at 1102. In the alternative, the court of appeals held that, even if the rule announced in *Ring* were subjected to a *Teague* analysis, it would nevertheless be retroactive because it falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. Pet. App. A-44; *Summerlin*, 341 F.3d at 1109 (citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

Petitioner filed a timely petition for writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

Petitioner's primary argument is that review is necessary because the court of appeals' opinion in this case conflicts with decisions of (1) the Arizona Supreme Court, *see State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); (2) the Tenth and Eleventh Circuits, *see Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), *and Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003); and (3) various state appellate courts of last resort, *see, e.g., Colwell v. State*, 59 P.3d 463 (Nev. 2002), *petition for cert. filed* May 21, 2003 (No. 02-10947), *and State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). Petitioner also argues that review by this Court is necessary because the court of appeals' decision "corrupts" this Court's analysis in *Bousley v. United States*, 523 U.S. 614 (1998), and "opens the door to untold litigation." Finally, Petitioner maintains that Mr. Summerlin's case does not implicate *Ring* because one of the aggravating factors underlying his death sentence involved a prior conviction.

Respondent acknowledges that the Arizona Supreme Court's reasoning in *Towery* is contrary to the court of appeals' analysis in this case.[1] He likewise recognizes that the retroactive application of *Ring* in federal habeas corpus proceedings is an important question of federal law. Accordingly, this case satisfies the Court's minimal criteria governing review on certiorari. *See* United States Supreme Court Rule 10.

For several reasons, however, the Court need not grant certiorari. First, the decisional conflicts identified in the

1. The Nevada Supreme Court's analysis in *Colwell v. State*, 59 P.3d 463, which relies considerably on *Towery*, also differs from the court of appeals' analysis in this case.

petition for writ of certiorari are not as significant as Petitioner maintains. Second, the court of appeals' thorough opinion, unlike any previous federal or state appellate decision to consider the issue, correctly identifies the substantive nature of this Court's ruling in *Ring* and properly concludes that, as a ruling on substantive criminal law, the decision must be given retroactive effect. Third, Petitioner is factually and legally incorrect in arguing that Mr. Summerlin's death sentence does not implicate *Ring* because one of the aggravating circumstances in his case involved a prior conviction. Mr. Summerlin will address each of these points in turn.

1. The fact that the court of appeals' analysis in this case differs from that of the Arizona Supreme Court in *Towery* is neither surprising nor particularly significant. By their very nature, all federal habeas cases present the potential for conflict between federal courts and state courts of last resort. The conflict between *Summerlin* and *Towery*, however, does not concern a substantive constitutional issue. Rather, it involves only the question of whether, in the interests of comity, finality, and judicial administration, a specific class of capital defendants will be permitted to invoke the Sixth Amendment guarantee this Court recognized in *Ring*. The legal principles governing this question are, quite permissibly, different under state and federal law.[2] Applying their distinct retroactivity analyses, the high courts of Arizona, Nevada and Nebraska have determined that they

2. Arizona determines retroactivity by a state law test that parallels in most respects, but is nevertheless distinct from, the federal *Teague* rule. *See State v. Slemmer*, 170 Ariz. 174, 179-82, 823 P.2d 41, 46-49 (1991) (adopting a retroactivity analysis combining elements from both *Teague* and *Allen v. Hardy*, 478 U.S. 255 (1986)).

will not apply *Ring* retroactively in state post-conviction proceedings. *See Towery*, 204 Ariz. 386, 64 P.3d 828; *Colwell*, 59 P.3d 463; *and Lotter*, 266 Neb. 245, 664 N.W.2d 892. The Missouri Supreme Court, however, has concluded that *Ring* must be applied retroactively. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003). Similarly, the court of appeals in this case concluded that, as a ruling on substantive criminal law, *Ring* necessarily applies retroactively. Such disagreements regarding the remedies available in state versus federal post-conviction proceedings are ones this Court need not – indeed, possibly may not – resolve. *Cf. Case v. Nebraska*, 381 U.S. 336 (1965) (discussing states' obligations to provide post-conviction relief for claims of federal constitutional violations). *See also Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of application for stay of execution) ("Because the scope of the state's obligations to provide collateral review is shrouded in so much uncertainty, . . . this Court rarely grants review at this stage of litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims.").

2. Petitioner also argues that review by this Court is necessary because other federal circuit courts and state courts of last resort have declined to apply *Ring* retroactively. However, critical factual and procedural distinctions exist between this case and the federal and state decisions Petitioner cites.

For example, although the Tenth Circuit refused to apply *Ring* retroactively in *Cannon v. Mullin*, that case involved a *successive* habeas petition governed by the strict standards of 28 U.S.C. § 2244(b). 297 F.3d at 992. Simply put, the Tenth Circuit was precluded from applying *Ring* retroactively

in that case because this Court had not yet ruled on the retroactivity issue, as is required by the Antiterrorism and Effective Death Penalty Act's narrow exception to its ban on successive petitions. *See* 28 U.S.C. § 2244(b)(2)(A). *Cannon* thus is not in conflict with *Summerlin*.

Similarly, the Eleventh Circuit's decision in *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), does not conflict with *Summerlin*. Although *Turner* discusses the potential retroactivity of *Ring* under *Teague*, that discussion is dictum. In fact, the court in *Turner* declined to consider whether *Ring* applied to Florida's capital sentencing procedure. *See id.* at 1280 and n.26. Accordingly, its comments about *Ring*'s retroactivity do not "conflict" with the Ninth Circuit's express ruling in *Summerlin*.

Other cases cited by Petitioner as "conflicts" (1) have been vacated, *see Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003), *vacated in part*, 343 F.3d 950 (8th Cir. 2003); (2) have held that *Ring* does not apply to the state statutes in question, thereby mooting any question of retroactive application, *see Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla.), *cert. denied*, 537 U.S. 1070 (2002), *and King v. Moore*, 831 So. 2d 143, 144-45 (Fla.), *cert. denied*, 537 U.S. 1067 (2002); or (3) do not even involve the *Ring* issue, *Moore v. Kinney*, 320 F.3d 767, 771-72 (8th Cir. 2003) (*en banc*), *cert. denied*, 123 S. Ct. 2580 (2003) (sole issues certified for appeal concerned the constitutionality of Nebraska's "exceptional depravity" aggravating circumstance).

In contrast, the one federal decision directly to rule on *Ring*'s retroactivity in the habeas corpus context reaches the same conclusion, for much the same reasons, as the court of appeals in this case. *See Palmer v. Clarke*, __ F. Supp.2d __, No. 4:00CV3020, 2003 WL 22327180 (D. Neb. Oct. 9, 2003).

3. In attempting to portray *Summerlin* as a far-reaching decision that improperly expands this Court's ruling in *Bousley* and threatens to engender "untold litigation," Petitioner muddles the narrow ruling in the case. *Summerlin* holds only that *Ring* must be applied retroactively to Arizona death row prisoners who were sentenced under the statute this Court declared unconstitutional in *Ring*. In so holding, the court of appeals expressly rejected Petitioner's claim that applying *Ring* retroactively in this instance would undermine, or implicate in any way, its prior ruling in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002), that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would not apply retroactively in federal habeas corpus proceedings. *See* Pet. App. A-63; *Summerlin*, 341 F.3d at 1121. The court of appeals emphasized that *Ring* caused the very statute at issue in this case to be declared unconstitutional. It also recognized that the trial-like nature of the penalty phase of a capital murder proceeding and "the Eighth Amendment constraints applicable to capital trials" distinguished this case from those addressing the retroactive application of *Apprendi*.

Moreover, far from "corrupting" this Court's analysis in *Bousley*, *Summerlin* simply applied that analysis in the context of the state capital murder statute at issue in *Ring*. In *Ring*, this Court held that, because aggravating circumstances are elements of the offense of capital murder in Arizona, a jury must determine beyond a reasonable doubt whether those circumstances exist. The procedural aspect of the Court's ruling in *Ring* – that a jury must determine the existence of aggravating circumstances beyond a reasonable doubt – is merely a consequence of the *substantive* holding in *Ring* – that aggravating circumstances are elements of the offense of capital murder in Arizona. Under *Bousley*, any

new decision that identifies the statutorily defined behavior that constitutes a crime, such as the crime of capital murder, falls outside the non-retroactivity rule of *Teague*. *Summerlin* simply acknowledges the substantive nature of the ruling in *Ring*, and then properly applies *Bousley* to determine *Ring*'s retroactive application.

4. Finally, Petitioner is simply incorrect in asserting that *Ring* does not apply to Mr. Summerlin's case because one of the two aggravating factors underlying his death sentence involved a prior conviction. At the July 1982 sentencing hearing, the trial judge found that Mr. Summerlin had previously been convicted of a felony "involving the threat or use of violence on another person." *See* Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended 1993). The Arizona Supreme Court has acknowledged that this aggravating circumstance requires a finding beyond the bare fact that a prior conviction existed. *State v. Ring*, 204 Ariz. 534, 558, 65 P.3d 915, 939 (2003). Specifically, it requires a finding that the crime involved the use or threat of violence, and "the Sixth Amendment demands that a jury perform this task." *Id.*[3]

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3. In any event, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), could affect Mr. Summerlin's Sixth Amendment claim only to the extent that it is a recognized exception to the constitutional rule of *Ring*. In this regard, Mr. Summerlin submits that the reasoning of *Almendarez-Torres* has been rejected by a majority of this Court. *See id.* at 248-71 (Scalia, Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
PETITIONER,

-vs-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO ARGUMENTS FOR DENYING THE PETITION

• Summerlin contends that the Ninth Circuit and the Arizona Supreme Court reached opposite results on whether the holding of *Ring v. Arizona*, 536 U.S. 584 (2002), should be applied retroactively to cases on collateral review was "neither surprising nor particularly significant." (Brief in Op. at 5; *compare Summerlin v. Stewart*, 312 F.3d 1157 (9th Cir. 2003), with *State v. Towery*, 204 Ariz. 386, 64 P.2d 828 (2003).) Summerlin reasons that, because the conflict "does not concern a substantive constitutional issue. . . . the legal principles governing this question are, quite permissibly, different under state and federal law." (*Id.*; footnote omitted.) This contention fails to recognize that the high courts of Arizona, Nevada and Nebraska are *not* free to adopt a retroactivity rule *less* favorable to a defendant than what the United States Constitution requires. *See Yates v. Aiken*, 484 U.S. 211 (1988) (a state court cannot refuse to apply a rule of federal constitutional law retroactively based on its interpretation limiting the scope of its post-conviction collateral proceedings). Thus, if the Ninth Circuit correctly concluded that the rule announced in *Ring* applies retroactively, the Arizona, Nevada, and Nebraska rulings to the contrary cannot stand.[1]

Neither of the two cases cited by Summerlin in support of this contention, *Case v. Nebraska*, 381 U.S. 336 (1965) and *Kyles v. Whitley*, 498 U.S. 931 (1990) (Stevens, J., concurring in denial of application for stay of execution), suggest that a state court can refuse to apply a new rule of constitutional procedure to cases that are final, if this Court has held the rule to be retroactive. Thus, Arizona's decision in *Towery*, as well as the decisions by the Supreme Courts of Nevada and Nebraska, are significant.

1. This Court recently denied certiorari in a case where the Nevada Supreme Court held that *Ring* does not apply retroactively. *Colwell v. Nevada*, No. 02–10947 (denied 11/3/2003). The defendants in the Arizona case which held that *Ring* does not apply to cases on collateral review have withdrawn their petition for certorari. *Towery et. al v. Arizona*, No. 03-5983 (dismissed 9/18/2003).

• Despite the clear conflict between the Ninth Circuit and the Arizona Supreme Court, Summerlin suggests that review by this Court is not necessary because "critical factual and procedural distinctions exist" between Summerlin's case and other decisions in federal circuit courts and state courts of last resort that have declined to apply *Ring* retroactively. (Brief in Op., at 6) To the extent these distinctions exist at all, they do not justify the divergent results reached by those courts—rather, they highlight the need for this Court's intervention.

Summerlin correctly notes that the Tenth Circuit refused to apply *Ring* retroactively in *Cannon v. Mullin* because Cannon failed to make a *prima facie* showing that his successive habeas petition satisfied the requirements of 28 U.S.C. § 2244(b)(3)(A). 297 F.3d 989, 990–91 (10th Cir. 2002). This is not, however, a basis for distinguishing the Tenth Circuit's ruling. Cannon argued that the requirement of 28 U.S.C. § 2244(b)(2)(A) (prohibiting application of a new constitutional rule in a successive habeas petition unless and until this Court deems the rule retroactive) did not apply because *Ring* was a new rule of *substantive* criminal law and therefore outside the limitations of *Teague v. Lane*, 489 U.S. 288 (1989). *Cannon*, 297 F.2d at 992, 994. In rejecting this argument, the Tenth Circuit specifically decided the first question raised here: whether *Ring* announced a new rule of substantive criminal law. The Tenth Circuit's holding cannot be squared with or distinguished from the Ninth Circuit's holding on that question.

Moreover, *Cannon* highlights the potential of a district court ordering a capital defendant resentenced after concluding that *Ring* should apply retroactively, but refusing to stay the execution of another prisoner because he raised a *Ring* claim in a successive habeas petition. Given the additional limitations on review under 28 U.S.C. § 2244(b)(2)(A), it is essential for this Court to resolve questions of retroactivity, particularly in capital cases, expeditiously.

Summerlin also argues that the Eleventh Circuit's decision in *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), does not conflict with the Ninth Circuit's express ruling in *Summerlin*. Summerlin mistakenly characterizes the Eleventh Circuit discussion of *Ring*'s retroactivity

under *Teague* as "dictum." (Brief in Op., at 7.) Turner had argued that *Ring* and Florida's capital sentencing procedure were "irreconcilable." *Turner*, 339 F.3d at 1280. The Eleventh Circuit did not reach the merits of that claim because it held both that (1) the claim was procedurally barred, "and, alternatively, (2) *Ring* does not apply retroactively to Turner." *Id.*

Summerlin also asserts that "[o]ther cases cited by Petitioner as 'conflicts'" have been vacated, have held that *Ring* does not apply to the state statutes or do not involve the *Ring* issue. (Brief in Op., at 7.) Petitioner did not offer these cases to establish a conflict, but rather as other examples where state and federal courts have declined to apply *Ring*. (Pet. at 12.) Summerlin does not dispute that the courts did not apply *Ring* in those cases. Moreover, although the defendant in *Whitfield v. Bowersox* was resentenced to life, thus effectively mooting any *Ring* issue in his case, the Eighth Circuit did not expressly vacate the portion of the opinion cited in the instant petition, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003). After the Missouri Supreme Court recalled its mandate, the Eighth Circuit vacated as moot different portions of the opinion. *Whitfield v. Bowersox*, 343 F.3d 950 (8th Cir. 2003).

Moreover, the Arizona Supreme Court has expressly declined to follow *Summerlin*, and other state courts have similarly concluded that this Court's holding in *Ring* should not apply retroactively. *State v. Montaño*, 2003 WL 22389442 (Ariz. Oct. 21, 2003); *State v. Sansing*, 77 P.3d 30, at ¶ 5 n.2 (Ariz. 2003); *State v. Nordstrom*, 77 P.2d 40, at ¶ 4 n.2 (Ariz. 2003); *Boyd v. State*, 2003 WL 22220330, at * 26 (Ala. Crim. App. filed 9/26/2003) (not yet released for publication); *Head v. Hill*, 2003 WL 22282293, at * 2–3 (Ga. Oct. 6, 2003).

Summerlin has identified one federal trial court holding that "the *Ring* decision announce[d] a substantive rule of criminal law and must be accorded retroactive effect." *Palmer v. Clarke*, 2003 WL 22327180, at * 33–37 (D. Neb. filed 10/9/2003). (Brief in Op. at 7.) But another federal trial court in the same district refused to grant a certificate of appealability on a *Ring* retroactivity claim because it was a successive petition, while noting a "strong inclination to respectfully disagree"

with the result in *Palmer*. *Ryan v. Clarke*, 2003 WL 22423159, at * 4–5 n.5 (D. Neb. filed 10/24/2003). If anything, these cases demonstrate the need for this Court to grant the petition. *See also United States v. Battle*, 264 F.Supp. 2d 1088, 1099–03 (N.D. Ga. 2003) (finding *Ring* to be non-retroactive, and granting *COA on Ring issue*, 2003 WL 22327183) (filed 9/22/2003); *Sibley v. Culliver*, 243 F.Supp. 2d 1278, 1288–90 (M.D. Ala. 2003) (holding *Ring* was barred by *Teague v. Lane*, 489 U.S. 288 (1989) and not substantive change); *Lessley v. Bruce*, 2003 WL 21402580 (D. Kan. 2003) (finding *Ring* non-retroactive).

- Summerlin argues that the holding in *Summerlin* only applies retroactively to Arizona death row prisoners. (Brief in Op., at 8.) But the *Palmer v. Clarke* case he cites belies his argument. There, the federal district court held that *Ring* announced a substantive rule of criminal law applicable to Nebraska death row inmates. *Id.* at * 37.

- At Summerlin's July 1982 sentencing proceeding, the trial court found as one of the aggravating circumstances that Summerlin had previously been convicted of a felony "involving the threat or use of violence on another person." *See* A.R.S. § 13–703(F)(2) (1981) (amended 1993). Summerlin correctly notes that the Arizona Supreme Court recently stated in discussing the pre-1993 version of (F)(2) that "when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform the task." *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 939 ¶ 68 (2003). "That situation can arise for defendants whose F.2 factor depended upon a finding that a prior conviction reflected a crime involving the use or threat of violence." *Id.* That discussion, however, was *dicta* because none of the consolidated cases involved a defendant sentenced under such a circumstance. *Id.*

In deciding whether the prior felony conviction involved a threat or use of violence on another person, the trial court in Summerlin's case did not make a *factual* finding. Rather, under Arizona law, the court made a *legal* determination, whether under the statutory definition of the prior crime or the jury instructions, the *only* way that the defendant

could have committed the crime would have been by the use of violence. *E.g.*, *State v. Lee*, 185 Ariz. 549, 557, 917 P.2d 692, 700 (1996); *State v. Kemp*, 185 Ariz. 52, 63–64, 912 P.2d 1281, 1292 (1996); *State v. Walden*, 183 Ariz. 595, 617, 905 P.2d 974, 986 (1995).

Furthermore, these types of legal determinations are exempt from the Sixth Amendment jury requirement under *Ring* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Therefore, the Ninth Circuit should have considered Arizona's argument that, because the trial court found one aggravating circumstance that fell outside the scope of *Ring*, Summerlin's case fell outside the holding of *Ring*.

- Summerlin contends that *Almendarez-Torres* is no longer good law because five Justices are on record disproving its holding. (Brief in Op., at 9 n.3.) Such an argument offers additional support for the Arizona's position that certiorari is warranted in this case.

CONCLUSION

Based on the foregoing authorities and arguments, this Court should grant the petition for writ of certiorari to either summarily reverse the decision of the Ninth Circuit, or to accept this case for full briefing and consideration upon the merits.

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No. 03-0526

In The Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEBRASKA, COLORADO, DELAWARE, MICHIGAN, MISSOURI, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is the Sixth Amendment right recognized by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) so radically different from the Sixth Amendment right applied to capital cases in *Ring v. Arizona*, 536 U.S. 584 (2002), that radically different answers to the retroactivity of these two holdings can be justified?

Does the new rule announced by this court in *Ring* clearly fall within that exceedingly rare class of cases which so alter our understanding of American justice that it should be retroactively applied in the collateral review of judgments which became final prior to the release of the *Ring* opinion?

May a federal court interpret substantive state law in a manner contrary to the specific rulings of a state's highest court?

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STATEMENT OF AMICI INTEREST

The State of Nebraska and the 12 amici states have a strong interest in this Court granting the State of Arizona's petition for a Writ of Certiorari in this case for the following reasons.

- The Nebraska Supreme Court, the highest courts of four other states and two federal circuit courts have rejected arguments that this Court's ruling in *Ring* is to be applied retroactively. Thus, the Ninth Circuit's position in this case grants *Ring v. Arizona*, 536 U.S. 584 (2002) relief to an Arizona prisoner when a similar request for relief would be denied in numerous other jurisdictions in this country. That marked disparity in the application of our federal constitution is unacceptable.

- Nebraska and other states which had employed judicial sentencing in capital cases prior to *Ring* had for decades conducted potential capital cases to final judgment in good faith reliance upon this Court's holdings in *Profitt v. Florida*, 428 U.S. 242 (1976), and *Walton v. Arizona*, 497 U.S. 639 (1990). It would be a significant detriment to the states' interest in accurate fact finding, justice, society's perception of justice, and the finite resources of state legal systems, if cases tried and affirmed on direct review in reliance upon *Proffit* and *Walton* were now required to be re-opened.

- The finality of judgments is a significant aspect of the system of justice these states desire to provide their citizens. The Ninth Circuit's position in this case unnecessarily erodes that legitimate legal and societal goal.

- The Ninth Circuit's position founds its analysis upon an interpretation of substantive Arizona law which

directly conflicts with a specific ruling of the Arizona Supreme Court upon that exact question. States have a vital interest in having their highest courts be the final arbiters of substantive state law.

- The Ninth Circuit's ruling injects unnecessary doubt and confusion into the resolution of *Ring* claims in all jurisdictions.

- The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring* even in jurisdictions which have long employed juries in the penalty phase of potential capital cases. The number and type of cases in which such arguments should be legitimately considered by the state courts will be materially expanded or contracted depending upon whether the Ninth Circuit's position on *Ring* retroactivity is rejected or affirmed.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit opinion creates a split of authority with two federal circuit courts and the highest courts of five states.

The Nebraska Supreme Court has specifically considered the issue of *Ring* retroactivity and concluded that this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002) is procedural in nature and does not meet the requirements of *Teague v. Lane*, 489 U.S. 288 (1989) for retroactive application. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

The highest courts of Alabama, Arizona, Georgia and Nevada have reached the same conclusion. *See*, *Boyd v. State*, 2003WL22220330 (Ala.Crim.App. Sep. 26, 2003); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003),

cert.dismissed; *Head v. Hill*, 2003WL22282293 (Ga. Oct. 06, 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002), *cert.pending*.

Courts of the Tenth and Eleventh Circuits have held that *Ring* is not retroactive. *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003). In addition, while not directly ruling, the Eighth, Seventh and Fifth Circuits have also indicated they would not apply *Ring* retroactively.[1]

Each of these state and federal circuit court rulings is in direct conflict with the Ninth Circuit's position upon *Ring* retroactivity. Such a conflict prevents the accurate and uniform enforcement of our federal constitution throughout this country.[2]

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[1] *Moore v. Kinney*, 320 F.3d 767, 771, fn 3 (8th Cir. 2003) ("The Supreme Court did not, and has not, expressly made the ruling in *Ring* retroactive. . . . Absent an express pronouncement on retroactivity from the Supreme Court, the rule from *Ring* is not retroactive."); *Whitfield v. Bowersox*, 324 F.3d 1009, 1012, fn 1 (8th Cir. 2003) (same); *Szabo v. Walls*, 313 F.3d 392, 398-399 (7th Cir. 2002) ("Unfortunately for Szabo, however, in order to apply *Apprendi* to capital sentencing, *Ring* first had to overrule *Walton v. Arizona*, [citation omitted]. Given *Teague*, it is *Walton* and not *Ring* that governs."); *In re Johnson*, 334 F.3d 403, fn 1 (5th Cir. 2003) (indicating that logical consistency would dictate no distinction between *Apprendi* and *Ring* retroactivity).

[2] E.g., the United States District Court for the District of Nebraska, following the Ninth Circuit majority's reasoning in *Summerlin*, recently concluded that *Ring* represents a rule of substantive law and thus has applied *Ring* retroactively to a judgment of conviction which became final in 1986. *Palmer v. Clarke*, ___ F.Supp. ___, 2003WL22327180, *35 (D.Neb., Oct. 9, 2003).

II. The Ninth Circuit's majority employs an erroneous characterization of *Ring* to create a nonexistent distinction between the Sixth Amendment right recognized in *Apprendi* and the Sixth Amendment right applied in *Ring*.

The Ninth Circuit having previously found *Apprendi* not to be retroactive,[3] the Ninth Circuit majority here attempts to create a distinction between the Sixth Amendment right recognized by this Court in *Apprendi* and the Sixth Amendment right applied by this Court to potential capital cases in *Ring*.[4]

Apprendi and *Ring* are not about two different and distinct Sixth Amendment rights.[5] They are about exactly the same Sixth Amendment right and have exactly the same impact upon capital and non-capital cases.[6]

In both *Apprendi* and *Ring* there existed under state law a fact which, if found, exposed an individual (already found guilty of a criminal offense) to greater punishment. In *Apprendi*, that fact was the nature of the guilty party's motivation for the offense. In *Ring*, that fact was whether a statutory aggravating circumstance was present with respect to the murder of which the defendant had already been found guilty. In both *Apprendi* and *Ring* this Court concluded that the Sixth Amendment entitled the guilty

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[3] *U.S. v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002).

[4] *Ring*, 536 U.S. at 588-589.

[5] *Ring*, 536 U.S. at 475.

[6] *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) ("[T]hat *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* announced a substantive rule.")

party to a jury determination of the punishment-enhancing fact.

Contrary to the Ninth Circuit majority's assertion,[7] both *Apprendi* and *Ring* were about nothing else but "who decides" a fact significant under state law. Neither *Apprendi* nor *Ring* alter substantive state law which establishes the fact in question and the impact of that fact, if found, upon the punishment of the guilty party.

III. As the holdings of *Apprendi* and *Ring* recognize and apply the same Sixth Amendment right, both rulings should be afforded similar treatment on the question of retroactivity.

If the Sixth Amendment right recognized by this court in *Apprendi* and applied to potential capital cases in *Ring* is the same right, then it becomes relevant that every federal circuit court, including the Ninth, and the highest courts of seven states, Arizona, Colorado, Florida, Illinois, Kansas, Minnesota and New Hampshire have all concluded that this Court's holding in *Apprendi* is procedural in nature and is not entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989).[8]

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[7] 341 F.3d at 1107.

[8] *Sepulveda v. U.S.*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. U.S.*, 329 F.3d 77 (2d Cir. 2003); *U.S. v. Swinton*, 333 F.3d 481 (3rd Cir. 2003); *U.S. v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *U.S. v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. U.S.*, 305 F.3d 378 (6th Cir. 2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002); *U.S. v. Moss*, 252 F.3d 993 (8th Cir. 2001); *U.S. v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *U.S. v. Mora*, 293 F.3d 1213 (10th Cir. 2002); *McCoy v. U.S.*, 266 F.3d 1245 (11th Cir. 2001).

(Continued on following page)

The amici states believe these holdings represent a correct reading of this Court's intentions in *Apprendi*, *Ring* and *Teague*.

IV. The Ninth Circuit majority founds its position upon an interpretation of Arizona law which is directly contrary to a specific ruling of the Arizona Supreme Court.

The amici states have a strong interest in having their highest courts be the final arbiters of the substantive law of their states. The analysis of *Ring* retroactivity by the Ninth Circuit majority below ignores that fundamental principle of federalism.

In its attempt to distinguish the Sixth Amendment right applied in *Ring* from the Sixth Amendment right recognized in *Apprendi* the Ninth Circuit majority begins by taking upon itself a responsibility reserved to the state courts: It takes upon itself the responsibility to define substantive state law.

> In *Ring*, conversely, the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona.[9]

State v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (Ariz.App. 2001); *People v. Bradbury*, 68 P.3d 494 (Colo.App. 2002), *rev.denied*, 2003WL1958429 (Colo.Sup.Ct. 2003); *Figarola v. State*, 841 So.2d 576 (Fla.App. 2003); *People v. De La Paz*, 204 Ill.2d 426, 791 N.E.2d 489 (2003); *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001); *Meemken v. State*, 662 N.W.2d 146 (Minn.App. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003). *See also, Teague v. Palmateer*, 184 Or.App. 577, 57 P.3d 176 (2002).

If *Ring* had altered the substantive law of Arizona, it would be the responsibility of the Arizona Supreme Court to declare the nature of that change to the substantive law of Arizona. In *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003), the Arizona Supreme Court did exactly the opposite. The Arizona Supreme Court specifically concluded that *Ring* did not alter the substantive law of that state.

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.[10]

It is not the place of the Ninth Circuit majority to substitute its judgment upon a question of substantive Arizona law for that of the Arizona Supreme Court.[11] Yet the Ninth Circuit majority did so and the product of that impermissible act became the lynchpin of the court's position on *Ring* retroactivity.

[9] 341 F.3d at 1107.

[10] *Towery*, 204 Ariz. at 392, 64 P.3d at 834.

[11] *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gurley v. Rhoden*, 421 U.S. 200 (1975).

The amici states have a strong interest in preserving the right of their state courts to articulate the substantive law of their states. Thus, the process by which the Ninth Circuit majority ignored that fundamental concept of federalism in resolving this case is of considerable concern to the states.

V. A second generation of *Ring* claims are already being litigated in the state courts.

The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final judgments of conviction.[12]

This Court resolving the *Ring* retroactivity issue would significantly impact the number and types of cases in which the state courts should legitimately consider such arguments.

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[12] *Goodin v. State*, 2003WL21805386, *7 (Miss. 2003) (state postconviction proceeding attempting to raise a *Ring*-based claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Russell v. State*, 849 So.2d 95, 146 (Miss. 2003) (same); *West v. State*, 2003WL22220502, *1 (Ala.Crim.App. 2003) (postconviction action alleging indictment against prisoner was fatally defective under *Ring* because it did not identify any aggravating circumstances). See also, *U.S. v. Mack*, 343 F.3d 929, 936 (8th Cir. 2003) (Claim that *Ring* requires submission to the jury of sentencing enhancements that do not raise the maximum sentence.)

CONCLUSION

The Court should grant a writ of certiorari in this case.

The amici states and their respective judiciaries across this country await a dispositive resolution of the conflict created by the Ninth Circuit majority in this case.

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The following items were printed in the Petition for Writ of Certiorari and are not reproduced in this Joint Appendix:

Appendix D: Order filed Jan. 12, 1998 (Arizona District Court).....D-1

Appendix C: Memorandum of Decision and Order filed Jan. 12, 1998 (Arizona District Court).....C-1

Appendix B: State v. Towery et al. filed Feb. 26, 2003 (Arizona Supreme Court opinion).....B-1

Appendix A: Summerlin v. Stewart filed Sept. 2, 2003 (Ninth Circuit en banc opinion).....A-1

RELEVANT DOCKET ENTRIES

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-125325

ITEM NO.	DOCUMENT	DATE FILED
1	INDICTMENT	Mar. 16, 1982

* * *

CR-119502

ITEM NO.	DOCUMENT	DATE FILED
1	INDICTMENT	May 11, 1981

* * *

69	VERDICT	Jun. 8, 1982
70	VERDICT	Jun. 8, 1982
71	VERDICT	Jun. 8, 1982
72	VERDICT	Jun. 8, 1982
73	VERDICT	Jun. 8, 1982
74	VERDICT	Jun. 8, 1982
75	VERDICT	Jun. 8, 1982
76	VERDICT	Jun. 8, 1982
77	VERDICT	Jun. 8, 1982
78	VERDICT	Jun. 8, 1982

* * *

80	NOTICE OF INTENT TO SEEK THE DEATH SENTENCE AND SENTENCING MEMORANDUM	Jun. 11, 1982

* * *

92	SPECIAL VERDICT	Jul. 12, 1982

* * *

———

Criminal Docket
Arizona Supreme Court
CASE NUMBER
CR-82-5612-AP

DISPOSITION	CITATION
Judgments Affirmed	138 Ariz. 426; 675 P.2d 686 (1983)

* * *

26	1/18/84	ORDER AFFIRMING CONVICTIONS AND SENTENCES (Mandate)

* * *

28	1/27/84	WARRANT OF EXECUTION – Execution set for Wednesday, March 21, 1984

* * *

35	3/06/84	ORDERED: The Motion for STAY of Execution is referred to the Hon. Philip W. Marquardt, Judge of the Superior Court of Maricopa County, for consideration in connection with the petitioner's Motion for Post-Conviction Relief.
36	3/12/84	Certified copy of MCSC Minute Entry dated 3/8/84 – Sentence of death STAYED pending final determination of Petition for Post Conviction Relief.
37	10/01/85	Copy of Order (Minute Letter) in ASC #5612-2-PC – Petition for Review of Petition for Post Conviction Relief denied
38	3/04/86	WARRANT OF EXECUTION – Execution set for Weddnesday [sic], May 21, 1986
39	5/05/86	USDC Order dated 5/2/86 – Execution STAYED pending HC [USDC #CIV 86-584-PHX-RGS]

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-119502
CR-125325
(Consolidated)

ITEM NO.	DOCUMENT	DATE FILED

* * *

115.	AMENDED PETITION----------	Oct. 12, 1984
116.	RESPONSE TO AMENDED PETITION FILED OCTOBER 12, 1984.----------	Oct. 25, 1984

* * *

133.	PETITION FOR REVIEW----------	Jul. 11, 1985

* * *

Criminal Docket
Arizona Supreme Court
CASE NUMBER
CR-85-0235-PC

* * *

1	7/16/85	Petition for Review [re Post Conviction Relief]

* * *

5	10/01/85	ORDERED: Petition for Review = DENIED

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

NO. CR 119502

ITEM NO.	DOCUMENT	DATE FILED
	* * *	
139	PETITION FOR POST-CONVICTION RELIEF	Jan. 20, 1987
	* * *	
155	PETITION FOR REVIEW OF POST-CONVICTION RELIEF ORDER AND DENIAL OF MOTION FOR REHEARING	May 22, 1989
	* * *	

Criminal Docket
Arizona Supreme Court

CASE NUMBER

CR-89-0161-PC

* * *

1	5/25/89	Petition for Review of Post-Conviction Relief Order and Denial of Motion for Rehearing
2	10/24/89	ORDERED: Petition for Review of Post-Conviction Relief Order and Denial of Motion for Rehearing = Denied.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-119502

ITEM NO.	DOCUMENT	DATE FILED
	* * *	
167	PETITION FOR POST-CONVICTION RELIEF	JULY 18, 1991
	* * *	
180	PETITION FOR REVIEW OF POST-CONVICTION RELEIF [sic] ORDER AND DENIAL OF MOTION FOR REHEARING	FEB. 14, 1992
	* * *	

Criminal Docket
Arizona Supreme Court

CASE NUMBER

CR-93-0496-PC

* * *

1	11/17/93	Petition for Review [on Denial of the Post-Conviction Relief]
2	3/01/94	ORDERED: Petition for Review = DENIED.

* * *

U.S. District Court

U.S. District Court for the District of Arizona (Phoenix)

CIVIL DOCKET FOR CASE #: 86-CV-584

* * *

4/11/86	1	PRELIMINARY PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY (28 USC §2254).
10/1/86	1 [sic]	Case reassigned to Judge Paul G. Rosenblatt (mg)
10/1/86	24	ORDER: ORDRD transferring this case to the Hon. PGR for all subsequent proceedings.
12/3/86	30	ORDER: (PRG) Rspndnts' mtn for ordr is granted & that this matter is stayed pending the ptnr's presentation to the state crts of the 3 unexhausted clms raised on pages 26-27 of the Amnd ptn for writ of h/c by prsn in state cstdy. FUR ORDRD that the ptnr shl file his post conviction relief mtn in state crt re the 3 unexhausted clms nlt 1-20-87. Ptnr shl so notify this crt @ the ti his state post conviction relief ptn is filed. FUR ORDRD that this crt's ordr dtd 10-14-86 is vacated. Crt shl set a new dte for a rspnsv pldg to the amnd ptn @ the ti the stay is lifted. FUR ORDRD that a s/h s/b hld on 2-23-87 @ 1:30, in Crtrm #1.
1/20/87	31	Ptnr's notification of filing of ptn for post conviction relief w/state court.

* * *

11/4/94	73	The Court has ORDERED that the above captioned matter is reassigned to Judge Roslyn O. Silver for all further proceedings.

* * *

11/13/97	129	MEMORANDUM OF DECISION AND ORDER: by Judge Roslyn O. Silver: Denying w/prej ptnr's ptn for writ of h/c and all amendments thereto
11/13/97	130	JUDGMENT ORDER: by Judge Roslyn O. Silver Ptnr's ptn to writ of h/c and all amendments thereto is denied w/prej and

* * *

1/12/98	134	ORDER by Judge Roslyn O. Silver denying w/prej motion for new trial by petitioner Warren Wesley Summerlin

* * *

2/9/98	136	NOTICE OF APPEAL by petitioner Warren Wesley Summerlin from District Court order

* * *

2/27/98	138	ORDER by Judge Roslyn O. Silver granting in part and denying in part motion for certificate of probable cause by petitioner [135-1], certificate of probable cause issued for claims 1.1, 1.2, 1.3, 1.4, 2 and 4 only,

* * *

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 98-99002

3/18/98 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Certificate of probable cause granted in part and denied in part. Certificate of Probable Cause is issued for claims 1.1, 1.2, 1.3, 1.4 and 4 only.

* * *

10/10/00 ARGUED AND SUBMITTED TO Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS [98-99002]

* * *

10/12/01 AFFIRMED (Terminated on the Merits after Oral); Affirmed (in part), Reversed (in part) and Remanded; Written, Signed, Published. Alex KOZINSKI, dissenting in part; Stephen S. TROTT, author; Sidney R. Thomas, dissenting in part) FILED AND ENTERED JUDGMENT. [98-99002] (pi)

10/25/01 Filed orig and 50 copies of aplt Warren Wesley Summerlin's petition for rehearing with suggestion for rehearing en banc of 15 pages; served on 10/24/01.

* * *

10/29/01 Filed original and 50 copies of Aple Terry L Stewart's petition for rehearing with suggestion for en banc of 16 pages (3,898 words) served on 10/26/01.

* * *

2/11/02 Filed order for PUBLICATION (Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS,): The opinion filed 10/12/01 is withdrawn; submission is

deferred pending the final disposition by the Supreme Court of State v. Ring (SC No. 01-488)

* * *

10/23/02 Filed order (Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS,): Pursuant to General Order 5.2.b, the panel has, sua sponte, requested that a vote be taken of the nonrecused active judges of this Court as to whether this case should be heard initially by an en banc panel of this Court. Pursuant to General Order 5.4.c(3), the parties are directed tof ile [sic] simultaneous briefs within twenty-one (21) days of the date of this order setting forth their respective positions on whether (1) Ring v. Arizona, 122S.Ct.2428 (2002), may be applied retroactively and (2) this case should be heard initially by an en banc panel of this Court.

* * *

11/22/02 Filed order (Mary M. SCHROEDER): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

* * *

12/10/02 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Harry PREGERSON, participated by telephone; Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Sidney R. THOMAS, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard C. TALLMAN, Johnnie B. RAWLINSON [98-99002] (eu)

* * *

9/2/03 FILED EN BANC OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Harry PREGERSON; Stephen R. REINHARDT, concurring; Diarmuid F. O'SCANNLAIN; Michael D. HAWKINS; Sidney R. THOMAS, M. M. McKEOWN; Kim M. WARDLAW; Raymond C. FISHER; Richard C. TALLMAN; Johnnie B. RAWLINSON, dissenting.) FILED AND ENTERED JUDGMENT.

* * *

9/10/03 Filed order (Sidney R. THOMAS,): Aple's unopposed motion pursuant to FRAP 41(d)(2) to stay the mandate for ninety (90) days is GRANTED.

10/14/03 Received notice from Supreme Court: petition for certiorari filed w/USSC as Supreme Court No. 03-526, filed on 9/23/03 and placed on docket on 10/8/03. (Casefiles)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
PLAINTIFF,	)	CR-119502
V.	)	CR-125325
WARREN WESLEY SUMMERLIN,	)	
DEFENDANT.	)	

PHOENIX, ARIZONA
JULY 8, 1982
1:30 P.M.

BEFORE: THE HONORABLE
PHILIP W. MARQUARDT, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AGGRAVATION/MITIGATION HEARING

VOLUME XI

APPEARANCES:

FOR THE PLAINTIFF:
JESSICA GIFFORD
ASSISTANT ATTORNEY GENERAL

FOR THE DEFENDANT:
GEORGE KLINK
COURT APPOINTED COUNSEL

[2] INDEX

WITNESS:	D	C	RD	RC	VD
BENDHEIM, OTTO L.	14	17	19		
TUCHLER, MYRON	21	23	24	25	

EXHIBITS: ADMITTED ON PAGE:

1 DOCUMENTS 6

[3] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:30 P.M.:)

THE COURT: THIS IS THE MITIGATION HEARING ON THE STATE VERSUS SUMMERLIN, CAUSE NUMBER 119502, AND 125325.

STATE READY?

MS. GIFFORD: READY, YOUR HONOR. JESSICA GIFFORD, ASSISTANT ATTORNEY GENERAL APPEARING.

THE COURT: DEFENSE READY?

MR. KLINK: DEFENDANT IS READY. GEORGE KLINK APPEARING ON BEHALF OF THE DEFENDANT.

THE COURT: THIS IS ALSO – HAVE ALL THE AFFIDAVITS AND MATERIAL BEEN FILED FOR THE MOTION FOR NEW TRIAL?

MR. KLINK: I BELIEVE THEY HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL RULE ON THAT OVER THE WEEKEND. IF YOU WANT TO ARGUE ON THAT – YOU CARE TO BE [sic] MAKE ORAL ARGUMENT AT THIS TIME?

MR. KLINK: WELL, I WOULD LIKE TO MAKE A FEW COMMENTS.

THE COURT: LET'S PROCEED ON THE ORAL ARGUMENT ON THE MOTION FOR NEW TRIAL.

MR. KLINK: THANK YOU, YOUR HONOR. OBVIOUSLY I'VE INCLUDED A NUMBER OF AREAS THAT I THINK ARE RELEVANT IN TERMS OF THE MOTION FOR NEW TRIAL.

[4] I THINK OF THE AREAS THAT I WANT TO BRING TO THE COURT'S ATTENTION, THAT I THINK IS ESPECIALLY SIGNIFICANT IN THIS, IS THE OPINION TESTIMONY OF THE POLICE OFFICER WITH REGARD TO HIS OBSERVATIONS OF BLOOD AND SEMINAL FLUID WHEN HE FOUND THE BODY, AND WHEN HE CONDUCTED THE SEARCH.

AND SPECIFICALLY DETECTIVE KLETTLINGER – I THINK WITHOUT A SHOWING OF ANY EXPERTISE IN THOSE AREAS, AND THE SHOWING THAT CLEARLY IN ORDER TO DETERMINE THE EXISTENCE OF BLOOD OR SEMINAL FLUID YOU HAVE TO CONDUCT SOME CHEMICAL TESTS, AND YOU HAVE TO KNOW HOW TO DO IT, THAT THAT AREA IS AN AREA WHICH THE DETECTIVE SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY ON.

FURTHERMORE, I WOULD REURGE THOSE OBJECTIONS, IN TERMS OF THIS MOTION WITH REGARD TO THE ADMISSIBILITY OF THE NUMEROUS PHOTOGRAPHS WHICH COULD ONLY HAVE BEEN CALCULATED AND – INTERPRETED AS CALCULATED TO INFLAME AND ENRAGE THE JURY IN ORDER TO SECURE A CONVICTION. AND WHICH HAD NO SIGNIFICANT PROBATIVE VALUE BEYOND THE FIRST OR SECOND PHOTOGRAPH.

THEY WERE CUMULATIVE, AS WELL AS UNNECESSARY TO PUT IN.

THANK YOU.

THE COURT: YOUR RESPONSE?

MS. GIFFORD: JUST BRIEFLY. I BELIEVE OUR [5] WRITTEN RESPONSE COVERS ALL OF THE LAW ON THE SUBJECT.

BRIEFLY, DETECTIVE KLETTLINGER ONLY TESTIFIED THAT IT WAS HIS OPINION THAT IT APPEARED TO BE BLOOD AND SEMINAL FLUID. I'VE CITED LAW THAT HE COULD ACTUALLY GIVE HIS OPINION. WE DIDN'T ASK HIM THAT. SO, REALLY, HE DIDN'T GIVE AN EXPERT OPINION.

AS FAR AS THE PHOTOGRAPHS GO, THEY WERE NOT CALCULATED TO PREJUDICE AND INFLAME THE JURY. NOT A SINGLE PHOTOGRAPH, ACCORDING TO THE MEDICAL EXAMINER, WAS DUPLICATIVE OF ANOTHER PHOTOGRAPH. EACH SHOWED SOMETHING DIFFERENT, AND THEY WERE VERY NECESSARY TO SHOW THE FORCE OF THE BLOWS TO THE VICTIM'S HEAD, TO HAVE STRONG ENOUGH BLOWS, SEVERAL TIMES, AND REPEATED PATTERNS OF THE BLOWS, ONE ON THAT TOP OF ANOTHER, CRUSHING HER SKULL. AND THAT WAS VERY CRUCIAL FOR THE STATE TO SHOW PREMEDITATION.

SO THERE WAS A PURPOSE FOR EACH AND EVERY ONE OF THOSE PHOTOGRAPHS. THERE WAS NOTHING CALCULATED BY THE PROSECUTION JUST TO ENRAGE THE JURY.

THE COURT: THANK YOU. I HAVE ALSO A MOTION BY THE DEFENDANT HIMSELF FOR A NEW

TRIAL, WHICH WILL BE CONSIDERED UNDER ADVISEMENT. AND I'LL GIVE YOU A RULING ON THIS BEFORE THE WEEKEND. YOU MAY PROCEED.

THE STATE MAY PROCEED WITH THE MITIGATION – LET'S SEE, THE AGGRAVATION [6] HEARING.

MS. GIFFORD: THANK YOU, YOUR HONOR. I WOULD LIKE TO MOVE FOR THE ADMISSION OF EXHIBIT NUMBER 1, WHICH IS A CERTIFIED COPY OF DOCUMENTS OF THE AGGRAVATED ASSAULT CONVICTION, THE INDICTMENT, AND A NUNC PRO TUNC MINUTE ENTRY JUST CORRECTING THE STATUTORY CITE. THEY'RE ALL CERTIFIED COPIES.

MR. KLINK: NO OBJECTION.

THE COURT: ALL RIGHT. THEY MAY BE ADMITTED.

MS. GIFFORD: YOUR HONOR, I'D LIKE TO RESERVE ARGUMENT ON WHAT THAT EXHIBIT SHOWS, THAT WE ARE INTRODUCING THAT TO SHOW THAT THE DEFENDANT HAS BEEN CONVICTED – PREVIOUSLY CONVICTED OF A CRIME INVOLVING A USE, OR THREATENED USE OF VIOLENCE ON ANOTHER PERSON, WHICH IS AN AGGRAVATING CIRCUMSTANCE UNDER OUR STATUTES.

I'D ALSO AT THIS TIME SIMPLY DIRECT THE COURT'S ATTENTION TO THE TRIAL TESTIMONY, AND I'D LIKE TO RESERVE TIME TO ARGUE WHAT THE TRIAL TESTIMONY SHOWS; THAT THE MURDER WAS CRUEL, HEINOUS OR DEPRAVED. AND THOSE ARE THE TWO AGGRAVATING CIRCUMSTANCES WE ARE USING.

THE COURT: I THINK WHAT WE DO MECHANICALLY – I THINK THE DEFENSE COUNSEL HAS ONE MORE WITNESS THAT HE WOULD WISH TO PRESENT AT A LATER TIME, WHICH WOULD [7] BE MONDAY.

SO WHAT WE CAN DO IS WE'LL HAVE AS MANY WITNESSES AS WE CAN TAKE TODAY. I UNDERSTAND TWO –

MS. GIFFORD: YOUR HONOR, I HAVE TWO. I THINK THEY'RE TECHNICALLY REBUTTAL WITNESSES TO HIS MITIGATION.

THE COURT: ALL RIGHT. THEN IF YOU HAVE A WITNESS ON MONDAY THAT YOU CARE TO PRESENT, I'LL BE GLAD TO DO THAT, AND WE'LL HAVE SENTENCING AT 1:30 ON MONDAY AFTERNOON.

MR. KLINK: I MAY REEVALUATE AFTER THE TESTIMONY TODAY.

MS. GIFFORD: MR. KLINK, I BELIEVE, HAS ONE WITNESS IN MITIGATION. I ASSUME THIS IS HIS TIME TO GO FORWARD.

THE COURT: YOU MAY PROCEED.

MR. KLINK: ALL RIGHT.

(COUNSEL CONFERRING WITH DEFENDANT).

MR. KLINK: I WILL WOULD [sic] CALL DR. TATRO.

THE COURT: ALL RIGHT. COME FORWARD AND BE SWORN, PLEASE.

YOUR CLIENT WANTS TO ASK A QUESTION.

MR. KLINK: WELL, YOUR HONOR, MAY WE APPROACH THE BENCH?

THE COURT: ALL RIGHT.

[8] (AN OFF THE RECORD DISCUSSION AT THE BENCH ENSUED, OUTSIDE THE HEARING OF THE COURT REPORTER.)

THE COURT: AT THE REQUEST OF DEFENSE COUNSEL AND HIS CLIENT, THE CLIENT WOULD LIKE TO HAVE A COUPLE OF MINUTES TO TALK OVER THE CALLING OF THIS WITNESS.

WE'LL GIVE YOU A FIVE MINUTE RECESS, AND THEN ANY DISCUSSION WILL BE ON THE RECORD.

(SHORT RECESS WAS HAD).

THE COURT: DEFENSE MAY PROCEED.

MR. KLINK: ALL RIGHT, YOUR HONOR. WITH THE CONSENT OF THE DEFENDANT, THE DEFENDANT HAS NO WITNESSES IN MITIGATION AT THIS TIME AND –

THE COURT: THIS WILL BE –

MR. KLINK: – AND WE'LL REST.

THE COURT: I'D LIKE BOTH YOU AND YOUR CLIENT TO KNOW THAT THIS IS THE TIME SET ASIDE FOR THE AGGRAVATION-MITIGATION HEARING ON THIS.

MR. KLINK: THAT'S CORRECT.

THE COURT: I PLAN TO PROCEED ON WITH SENTENCING ON MONDAY AT 1:30, AFTER I HAVE REVIEWED THE ENTIRE RECORD AND MAKE THE NECESSARY FINDINGS.

SO AT THAT TIME YOU HAVE – YOU TELL ME THAT YOU HAVE ONE WITNESS THAT YOU MAY PRESENT ON MONDAY?

[9] MR. KLINK: WELL, I WOULD NOT CALL ANY WITNESSES AT ALL.

THE COURT: ALL RIGHT.

MR. KLINK: EITHER TODAY OR ON MONDAY, YOUR HONOR.

THE COURT: I'LL ALLOW THE DEFENDANT TO MAKE ANY STATEMENT THAT HE WISHES TO ME, OR NONE, ON MONDAY.

MR. KLINK: ALL RIGHT.

THE COURT: MISS GIFFORD?

MS. GIFFORD: YOUR HONOR, IT'S MY UNDERSTANDING – AT LEAST MY IMPRESSION – THAT THIS IS THE DEFENDANT'S DECISION THAT HE DOES NOT WISH CERTAIN WITNESSES TO BE CALLED.

COULD WE HAVE THAT REFLECTED ON THE RECORD, PERHAPS, BECAUSE –

THE COURT: I THINK IT HAS BEEN, AND MR. SUMMERLIN, I'LL ADDRESS YOU DIRECTLY, TO MAKE SURE THAT – FOR ANY ERROR THAT MIGHT

POSSIBLY BE CLAIMED AT THIS TIME – TO MAKE SURE THAT YOU UNDERSTAND THAT YOU ARE FACING A POTENTIAL DECISION BETWEEN EITHER LIFE IMPRISONMENT OR THE DEATH PENALTY, AND THIS IS THE TIME IN WHICH YOU MUST DECIDE WHETHER YOU PRESENT ANY MITIGATION WITNESSES ON YOUR BEHALF.

THIS IS YOUR ENTITLEMENT. YOUR LAWYER HAS TOLD ME THAT AT THIS TIME YOU DO NOT WISH TO, AND [10] HE IS TELLING ME THAT YOU DO NOT WISH TO CALL ANY MITIGATION WITNESSES. IF THIS IS CORRECT I'LL ACCEPT YOUR DECISION.

BUT I WANT IT TO BE VERY CLEAR THAT THIS IS THE TIME, AND ONLY TIME, THAT YOU'LL BE ABLE TO HAVE TO DO THIS.

SO YOU DON'T EVEN NEED TO RESPOND TO ME. YOU UNDERSTAND WHAT I'M TELLING YOU?

THE DEFENDANT: YES.

THE COURT: ALL RIGHT. FINE THEN.

THE DEFENDANT: LET ME TALK TO HIM.

THE COURT: YES.

(COUNSEL CONFERRING WITH DEFENDANT)

THE COURT: I THINK PROBABLY IT WOULD ALSO BE FAIR FOR ME TO TELL YOU, JUST TO MAKE SURE WE UNDERSTAND EACH OTHER, THAT UNDER THE STATUTES AND UNDER THE CODE THAT I OPERATE UNDER IN ARIZONA, THERE ARE A LIST OF AGGRAVATING FACTORS, AND A LIST OF MITIGATING FACTORS THAT HAVE TO BE DETERMINED.

THOSE FACTORS – CERTAIN AGGRAVATING FACTORS HAVE BEEN PRESENTED TO ME BY THE STATE OF ARIZONA. IF I FIND ANY ONE OF THOSE AGGRAVATING FACTORS TO EXIST – IF I FIND AN ABSENCE OF – OR NO MITIGATING FACTORS – THEN I'M AUTHORIZED TO GIVE THE MAXIMUM PENALTY, WHICH CAN BE THE DEATH PENALTY.

[11] I WANT YOU TO KNOW THAT AT THIS TIME I HAVE MADE NO DECISION AT THIS TIME OF WHAT I'M GOING TO DO IN YOUR PARTICULAR CASE. THAT WILL BE OVER THE WEEKEND, AFTER I'VE HEARD FINAL ARGUMENT BY BOTH COUNSEL.

MR. KLINK: ONLY THING I WOULD ADD AT THIS TIME, YOUR HONOR – AT THIS TIME THE DEFENDANT HAS REQUESTED, AND OBVIOUSLY THE STATE WILL HAVE AN OPPORTUNITY TO RESPOND – BUT THERE WAS A TRANSCRIPT OF A VIDEO TAPED DEPOSITION THAT WAS PREPARED AND TAKEN AT THE ATTORNEY GENERAL'S OFFICE SOMETIME PRIOR TO TRIAL. AND THE DEFENDANT HAS REQUESTED THAT THE COURT REVIEW THAT VIDEO TAPED DEPOSITION.

I BELIEVE THE TRANSCRIPT WOULD BE SUFFICIENT IN MAKING A DETERMINATION. THE DEFENDANT BELIEVES IT WOULD BE IN HIS BEST INTEREST FOR YOU TO DO THAT. I DON'T BELIEVE THE STATE HAS OBJECTIONS TO THAT OR NOT.

MS. GIFFORD: I HAVE NO OBJECTION, IN VIEW OF THE COURT – THAT THE COURT IS REQUIRED TO CONSIDER ANYTHING OFFERED IN MITIGATION.

THE COURT: HAS THAT BEEN PREPARED FOR YOU?

MR. KLINK: I BELIEVE MR. TOTH HAS PREPARED IT, AND IT'S PROBABLY BEEN FILED ALREADY.

THE COURT: I'LL REVIEW THAT OVER THE WEEKEND, [12] WITHOUT ANY FURTHER COMMENT. CONSIDER IT DONE.

MR. KLINK: OKAY.

MS. GIFFORD: YOUR HONOR, THE STATE WAS ANTICIPATING CALLING CERTAIN REBUTTAL WITNESSES. MAY THOSE WITNESSES BE EXCUSED FROM THEIR SUBPOENAS AT THIS TIME?

THE COURT: AGAIN, MY QUESTION TO YOU, AFTER YOU'VE TALKED TO YOUR CLIENT – DO YOU HAVE – IS IT STILL YOUR DECISION – AND IT'S STRICTLY YOUR DECISION – WHETHER TO CALL WITNESSES OR NOT?

MR. KLINK: YES, YOUR HONOR. WE HAVE NOTED IN THE PRESENTENCE REPORT DR. TATRO'S EVALUATION OF THE DEFENDANT IS INCLUDED AND ATTACHED THERETO. AND THEREFORE, IN CONSULTING WITH THE DEFENDANT, WE HAVE DECIDED, AND I BELIEVE THAT IS HIS DECISION, AS WELL AS MINE, IN CONSULTATION WITH HIM, TO RELY ON THE REPORT THAT HAS BEEN – THE EVALUATION OF DR. TATRO THAT HAS BEEN ATTACHED TO THE PRESENTENCE REPORT.

THE COURT: I HAVE THAT AVAILABLE, AND HAVE SPENT QUITE A BIT OF TIME WITH THAT.

MS. GIFFORD: THAT BEING THE CASE, I DO HAVE TO CALL MY REBUTTAL WITNESSES.

MS. GIFFORD: MAY I PROCEED AT THIS TIME?

THE COURT: YES, YOU MAY PROCEED.

THE DEFENSE HAS NO WITNESSES?

[13] MR. KLINK: RIGHT.

MS. GIFFORD: THANK YOU.

THE COURT: IT'S NOTED THAT NO WITNESSES ARE CALLED AT THIS TIME, OTHER THAN IN THE PSYCHIATRIC STATEMENT REFERRED TO, AND THE TRANSCRIPT.

MR. KLINK: RIGHT. WELL, THE REASON I POINT THAT OUT, YOUR HONOR, IS THAT IT IS ATTACHED TO THE PRESENTENCE REPORT. IT'S OBVIOUSLY SOMETHING THAT THE COURT IS GOING TO CONSIDER ANYWAY.

THE COURT: YES, I WILL.

MR. KLINK: I DON'T SEE THAT THAT SHOULD CHANGE THE STATE'S POSITION.

THE COURT: I'M SORRY. NOW, IT'S THE STATE'S POSITION – IT'S YOUR POSITION THERE ARE NO FURTHER WITNESSES AT THIS TIME?

MR. KLINK: THAT'S CORRECT.

THE COURT: I'LL GIVE YOU A CHANCE TO REBUT, IF YOU CHOOSE TO HAVE ANY REBUTTAL.

YOU MAY PROCEED ON.

MS. GIFFORD: THANK YOU, YOUR HONOR. I WOULD CALL DR. BENDHEIM.

THE COURT: COME FORWARD AND BE SWORN, PLEASE. PLEASE TAKE THE STAND.

(NEXT PAGE, PLEASE.)

[14] OTTO L. BENDHEIM, M.D., CALLED AS A WITNESS HEREIN, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. GIFFORD:

Q. WOULD YOU STATE YOUR NAME, PLEASE?

A. OTTO L. BENDHEIM.

Q. WHAT IS YOUR PROFESSION, DOCTOR?

A. I'M A PHYSICIAN, SPECIALIZING IN PSYCHIATRY.

Q. HOW LONG HAVE YOU BEEN IN THAT PROFESSION?

A. I WAS BOARD CERTIFIED IN 1948.

THE COURT: COUNSEL, WILL YOU STIPULATE TO DR. BENDHEIM'S QUALIFICATIONS?

MR. KLINK: YES.

THE COURT: ALL RIGHT. YOU MAY PROCEED.

MS. GIFFORD: THANK YOU, YOUR HONOR.

Q. DOCTOR, HAVE YOU HAD OCCASION TO EXAMINE WARREN WESLEY SUMMERLIN?

A. YES.

Q. CAN YOU POINT HIM OUT?

A. YES. HE'S SITTING NEXT TO COUNSEL – LEFT SIDE OF COUNSEL.

Q. THANK YOU. WHEN DID YOU EXAMINE MR. [15] SUMMERLIN?

A. ON JULY 7, 1981, JUST ABOUT A YEAR AGO.

Q. WHERE WAS THAT?

A. IN THE MARICOPA COUNTY JAIL.

Q. WHAT WAS YOUR PURPOSE IN EXAMINING HIM THEN?

A. THIS WAS A COURT APPOINTMENT FOR A DETERMINATION OF COMPETENCY. AND IF POSSIBLE, A DETERMINATION OF FRAME OF MIND AT THE TIME OF THE OFFENSE.

Q. CAN YOU SUMMARIZE YOUR FINDINGS IN REGARD TO THE RULE 11 EXAMINATION?

A. YES, MA'AM. I FOUND HIM COMPETENT TO STAND TRIAL, AT THE TIME I EXAMINED HIM, AND I FOUND NO EVIDENCE OF ANY TYPE OF MAJOR

PSYCHIATRIC DISORDER THAT COULD BE DIAGNOSED, THAT I COULD POINT OUT AT THE TIME OF THE ALLEGED OFFENSES.

I DID FIND THE PERSONALITY OF CHARACTER DISORDER.

Q. DO YOU HAVE AN OPINION WHETHER, TO A DEGREE OF REASONABLE MEDICAL CERTAINTY, MR. SUMMERLIN'S CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT WAS SIGNIFICANTLY IMPAIRED AT THE TIME OF THE CRIME?

A. YES, I HAVE AN OPINION. MY EXAMINATION [16] REVEALED NOTHING THAT WOULD INDICATE THAT HE WOULD BE UNABLE TO DO SO.

Q. LET ME ASK YOU THIS QUESTION, ALSO. DO YOU HAVE AN OPINION TO A DEGREE OF REASONABLE MEDICAL CERTAINTY, WHETHER HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SIGNIFICANTLY IMPAIRED?

A. LET ME SAY THAT I FOUND NOTHING THAT WOULD INDICATE TO ME THAT HE HAD SUCH AN IMPAIRMENT.

I WILL QUALIFY, HOWEVER. I TALKED TO ONE PSYCHIATRIST, WHO I RESPECT VERY HIGHLY, DR. GARCIA, WHO HAD A DIFFERENT OPINION FROM MINE.

Q. DID YOU FIND ANY EVIDENCE TO SUPPORT WHAT YOU DISCUSSED WITH DR. GARCIA?

A. NO. I MUST SAY THAT I COULD NOT GO ALONG WITH HIS THINKING IN THIS MATTER.

Q. DID YOU FIND ANY EVIDENCE OF PYSCHOMOTOR EPILEPSY?

A. NO. I REQUESTED, AND DR. GARCIA REQUESTED, NEUROLOGICAL EVALUATION. THAT WAS DONE. THE ONLY THING THAT REVEALED, WHICH WAS VERY SLIGHTLY MINIMALLY SUGGESTIVE, IS A MINOR DISTURBANCE IN THE ELECTROENCEPHALOGRAPHIC WAIVE PATTERN IN THE ELECTROENCEPHALOGRAM; SLIGHT DISTURBANCE.

AND THE NEUROLOGIST WAS NOT ABLE TO MAKE AN EVALUATION ON THE PYSCHOMOTOR.

[17] MS. GIFFORD: THANK YOU. I HAVE NO FURTHER QUESTIONS.

THE COURT: CROSS EXAMINATION?

CROSS EXAMINATION

BY MR. KLINK:

Q. YOU DID SAY THAT YOU – WELL, LET ME ASK YOU THIS, DOCTOR: DO YOU RECALL WRITING A LETTER TO JUDGE DERICKSON IN DECEMBER OF 1981?

A. YES, I DO.

Q. AND –

A. WAIT A MOMENT. DECEMBER? YES, I HAVE DECEMBER 1ST, 1981.

Q. OKAY. AND YOU DID REPORT IN THAT LETTER DR. GARCIA'S FINDING THAT MR. SUMMERLIN HAD VERY VIVID OLFACTORY HALLUCINATIONS PRECEDING OUTBURSTS, DID YOU NOT, SIR?

A. YES.

Q. WHAT DOES THAT – CAN YOU TELL ME WHAT THAT TERMINOLOGY MEANS? NOW, I KNOW YOUR OPINION IS DIFFERENT FROM DR. GARCIA'S, BUT OBVIOUSLY HE MADE SUCH A FINDING. AND IF YOU CAN TELL US, IN LAYMAN'S LANGUAGE, WHAT THAT TERMINOLOGY, "VIVID OLFACTORY HALLUCINATIONS PRECEDING OUTBURSTS" – WHAT DOES THAT MEAN?

[18] A. HALLUCINATIONS IS A SENSORY PERCEPTION, WHICH IS NOT BASED UPON PERCEIVABLE FACTS. IN OTHER WORDS, IF SOMEBODY HAS AN OLFACTORY, OR SMELL HALLUCINATION, HE EXPERIENCES A SENSATION OF SMELL, OF ODOR, OF SCENT THAT NOBODY ELSE CAN DETECT, BECAUSE IT ISN'T IN REALITY. IT'S NOT PRESENT. IT'S INTERNALLY PRODUCED DUE TO SOME CENTRAL NERVOUS SYSTEM TYPE OF ACTION.

NOW, IF THIS OCCURS, IN THE ABSENCE OF MAJOR MENTAL ILLNESS, IN THE ABSENCE OF, LET'S SAY, SCHIZOPHRENIA, AND IF IT OCCURS JUST AHEAD OF AN EXPLOSIVE TYPE OF OUTBURST, A RAGE REACTION, WE VERY STRONGLY THINK OF PSYCHOMOTOR EPILEPSY.

WE CALL THAT ILLUSIONARY AURA, A PREMONITION OR SOME KIND OF INITIATION OF A SEIZURE WHICH OCCURS INVOLUNTARILY. WHEN THE SEIZURE THEN OCCURS, THEN ONE WOULD BE JUSTIFIED IN POSTULATING THAT THE MAN LOSES CONTROL OVER HIS CONDUCT OR HIS ACTIVITIES AND IS NOT FULLY – MAY BE NOT AT ALL AWARE OF HIS CONDUCT.

SO DR. GARCIA CALLED ME AND GAVE ME THE STRONG IMPRESSION THAT HE FELT THIS WAS PRESENT. I SUGGESTED NEUROLOGICAL EVALUATION. IT WAS DONE, AND THE NEUROLOGIST COULDN'T CONFIRM DR. GARCIA'S IMPRESSION. NEITHER COULD I, REALLY.

[19] BUT NEVERTHELESS, IN MANY CASES THAT DR. GARCIA AND I WORK TOGETHER, WE HAVE BEEN IN CONFORMITY, USUALLY 99 PERCENT OF THE CASES.

SO THAT WAS ONE WHERE WE DIDN'T AGREE, AND THAT'S WHY I FELT I SHOULD MENTION IT TO THE COURT.

Q. WELL, I THINK THE COURT WILL FIND THAT VERY SIGNIFICANT. AND I THANK YOU FOR YOUR CANDOR.

SO THIS IS – THIS IS ONE AREA OF POSSIBILITY WHERE EXPERTS CAN DISAGREE, AND IN FACT HAVE DISAGREED, ISN'T THAT CORRECT?

A. YES.

Q. ALL RIGHT. AND YOU DO VERY HIGHLY RESPECT DR. GARCIA IN HIS EVALUATION?

A. I DO.

MR. KLINK: ALL RIGHT. THANK YOU VERY MUCH, DOCTOR.

THE COURT: STATE?

MS. GIFFORD: JUST ONE QUESTION, YOUR HONOR.

REDIRECT EXAMINATION

BY MS. GIFFORD:

Q. YOU FOUND – YOU AND THE NEUROLOGIST FOUND ABSOLUTELY NO EVIDENCE OF OLFACTORY HALLUCINATIONS, THOUGH, IS THAT CORRECT?

A. NO. NOW, THE WORD "ABSOLUTELY" BOTHERS [20] ME A LITTLE BIT. BECAUSE THE NEUROLOGIST DID FIND A MINOR ELECTROENCEPHALOGRAM DISTURBANCE IN THE TEMPORAL LOBE – IN THE AREA WHERE TEMPORAL LOBE OR PSYCHOMOTOR TYPE OF EPILEPSY ORIGINATES.

Q. THERE WAS NO CONFIRMATION, HOWEVER, THAT THERE IS OLFACTORY HALLUCINATIONS PRESENT, IS THAT CORRECT?

A. I WAS NOT AWARE OF IT, YES.

Q. AND YOU DID NOT FIND IT YOURSELF?

A. THAT'S CORRECT.

Q. YOU DISAGREE WITH DR. GARCIA IN HIS FINDING, CORRECT?

A. YES.

MS. GIFFORD: THANK YOU. NO FURTHER QUESTIONS.

MR. KLINK: NOTHING FURTHER. THANK YOU.

THE COURT: YOU MAY STEP DOWN. THANK YOU FOR TESTIFYING. YOU'RE PERMANENTLY EXCUSED.

MS. GIFFORD: YOUR HONOR, I CALL DR. TUCHLER

THE COURT: ALL RIGHT.

THE WITNESS: MYRON TUCHLER.

THE COURT: PLEASE TAKE THE STAND.

(NEXT PAGE, PLEASE.)

[21] MYRON TUCHLER, M.D.,

CALLED AS A WITNESS HEREIN, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. GIFFORD:

Q. WOULD YOU STATE YOUR NAME, PLEASE?

A. MYRON TUCHLER.

Q. WHAT IS YOUR PROFESSION, SIR?

A. PHYSICIAN.

Q. AND DO YOU HAVE A SPECIALTY AREA?

A. PSYCHIATRY, NEUROLOGY.

MS. GIFFORD: I WONDER IF COUNSEL WILL STIPULATE TO THE QUALIFICATIONS OF THIS EXPERT.

MR. KLINK: I SO STIPULATE.

THE COURT: THANK YOU. YOU MAY PROCEED.

BY MS. GIFFORD:

Q. DID YOU HAVE OCCASION TO EXAMINE THE DEFENDANT IN THIS CASE, DR. TUCHLER?

A. I DID, MISS GIFFORD.

Q. WHEN DID YOU DO THAT?

A. I THINK IN JUNE, THE 30TH, 1981.

Q. AND YOUR PURPOSE IN EXAMINING HIM, SIR?

A. RULE 11.

Q. WHAT WERE YOUR CONCLUSIONS, JUST BRIEFLY?

[22] A. PERSONALITY DISORDER WITH A SUBHEADING OF AN EXPLOSIVE PERSONALITY, AND A SUBHEADING OF A LEARNING DISABILITY.

Q. ARE ANY OF THOSE MAJOR MENTAL ILLNESSES?

A. NO.

Q. DO YOU HAVE AN OPINION ON WHETHER THE ABILITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT WAS SIGNIFICANTLY IMPAIRED?

A. I HAVE.

Q. AND WHAT IS YOUR OPINION?

A. IT WAS NOT.

Q. DO YOU ALSO HAVE AN OPINION ON WHETHER THE DEFENDANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF LAW WAS SIGNIFICANTLY IMPAIRED?

A. I HAVE AN OPINION.

Q. AND WHAT IS IT?

A. IT WAS NOT.

Q. HOW WOULD YOU EXPLAIN HIS BEHAVIOR?

A. HE HAS A LONG HISTORY OF PERSONALITY DISORDER, WHICH EXPLAINS THE BEHAVIOR, BUT IT'S NOT A MENTAL DISEASE OR DEFECT.

Q. BUT IT'S NOT A MENTAL DISEASE OR DEFECT THAT CAUSES IT?

A. NO. IT'S A PERSONALITY DISORDER, NOT A MENTAL DISEASE. THE ONLY ONE ISSUE I FOUND FROM [23] EXAMINING HIM, WITH SOME CARE, WAS THAT HE COULDN'T READ AND WRITE; THAT HE

HAD A LEARNING DISABILITY; THAT HE ALSO HAD A READING AND WRITING DISABILITY.

HE WAS DYSLEXIC, WHICH HAS BEEN WITH HIM EVER SINCE CHILDHOOD. AND ALSO HE HAD A TYPE OF PERSONALITY THAT EXPLODES IN RAGE ON THE LEAST PROVOCATION OR MINIMAL PROVOCATION. THAT FITS INTO THE CATEGORY OF PERSONALITY DISORDERNESS.

Q. DYSLEXIA, IT'S A LEARNING DISABILITY, CORRECT?

A. THE INABILITY TO READ, RIGHT.

MS. GIFFORD: YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF DR. TUCHLER AT THIS TIME.

THE COURT: CROSS EXAMINATION?

CROSS EXAMINATION

BY MR. KLINK:

Q. DOCTOR, WITH REGARD TO THIS EXPLOSIVE PERSONALITY, ONCE THE EXPLOSIVE EVENT IS SET IN MOTION, ARE THERE INDIVIDUALS WHO THEN NO LONGER HAVE ANY DEGREE OF CONTROL IN MINIMIZING THE DAMAGE THAT EXPLOSIVE EVENT CAN CAUSE?

A. I HAVE TO AGREE WITH THAT IN THE AFFIRMATIVE, SIR.

Q. OKAY. I TAKE IT – HAVE YOU AN OPINION [24] AS TO WHETHER MR. SUMMERLIN IS IN THAT CATEGORY?

A. WELL, I HAVE AN OPINION. I SO STATED IT IN MY REPORT. BASED UPON HIS BEHAVIOR IN HAMMERING AWAY AT AN AUTOMOBILE, THAT IS THE INDEX THAT I USED IN COMING TO THAT CONCLUSION.

Q. THIS IS AN INCIDENT WHERE SOMEONE HIT HIS WIFE WITH AN AUTOMOBILE, AND HE WENT BERSERK AND BEAT THE AUTOMOBILE UP, SO-TO-SPEAK?

A. YES, THAT'S EXACTLY IT.

Q. AND THAT'S THE KIND OF PERSONALITY WE ARE DEALING WITH?

A. YES.

MR. KLINK: ALL RIGHT. I HAVE NO FURTHER QUESTIONS. THANK YOU.

THE COURT: REDIRECT?

MS. GIFFORD: THANK YOU, YOUR HONOR.

REDIRECT EXAMINATION

BY MS. GIFFORD:

Q. DOCTOR, IS IT CORRECT TO SAY THAT HE HAS THE CAPACITY TO CONTROL THIS EXPLOSIVE PERSONALITY, BUT HE JUST DOESN'T?

A. ONCE IT'S TRIGGERED HE LOSES CONTROL. BUT THIS IS NOT A PSYCHOSIS. THIS IS A PERSONALITY TRAIT.

[25] MS. GIFFORD: OKAY. THANK YOU, YOUR HONOR. I HAVE NO FURTHER QUESTIONS.

MR. KLINK: I DO HAVE MAYBE ONE OR TWO OTHER QUESTIONS.

RECROSS EXAMINATION

BY MR. KLINK:

Q. DOCTOR, WHAT KIND – IS IT EXTERNAL STIMULI THAT TRIGGERS THAT EXPLOSIVENESS AND THEN THIS INABILITY TO CONTROL?

A. I CAN'T ANSWER THAT. I'D HAVE TO GO INTO MORE DETAIL. IN THE CASE OF THE AUTOMOBILE, AND HIS BEATING ON THE AUTOMOBILE, OBVIOUSLY IT WAS SOMETHING EXTERNAL. BUT THE SPECIAL STRUCTURE OF A MIND THAT FUNCTIONS IN THIS WAY IS, OF COURSE, THE ENIGMA WITH WHICH WE ARE DEALING.

MR. KLINK: I HAVE NO FURTHER QUESTIONS.

THANK YOU, DOCTOR.

THE COURT: YOU MAY STEP DOWN. THANK YOU FOR TESTIFYING. YOU'RE EXCUSED PERMANENTLY.

THE WITNESS: THANK YOU.

MS. GIFFORD: YOUR HONOR, I HAVE NO FURTHER REBUTTAL WITNESSES.

THE COURT: MR. KLINK, DO YOU HAVE ANYTHING FURTHER TO PRESENT OTHER THAN,

CLOSING STATEMENT AT THE [26] TIME OF SENTENCING ON MONDAY?

MR. KLINK: WE WOULD HAVE NOTHING FURTHER, YOUR HONOR, AND WE WOULD BE PREPARED FOR SENTENCING ON MONDAY.

THE COURT: MONDAY AT 1:30. I'LL SEE YOU THEN.

* * *

I, STEVEN C. TOTH, JR., OFFICIAL COURT REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING PAGES NUMBERED 2 THROUGH 26, CONSTITUTE A FULL, TRUE AND ACCURATE RECORD OF MY STENOGRAPHIC NOTES, TAKEN AT SAID TIME AND PLACE, TRANSCRIBED THROUGH THE ASSISTANCE OF COMPUTER. ALL DONE TO THE BEST OF MY SKILL AND ABILITY.

DATED THIS 14TH DAY OF NOVEMBER, 1982.

STEVEN C. TOTH, JR.
OFFICIAL COURT REPORTER

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, PLAINTIFF, V. WARREN WESLEY SUMMERLIN, DEFENDANT.	CR-119502 CR-125325

PHOENIX, ARIZONA
JULY 12, 1982
1:40 P.M.

BEFORE: THE HONORABLE
PHILIP W. MARQUARDT, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING
VOLUME XII

APPEARANCES:

FOR THE PLAINTIFF:
JESSICA GIFFORD
ASSISTANT ATTORNEY GENERAL

FOR THE DEFENDANT:
GEORGE KLINK
COURT APPOINTED COUNSEL

* * *

[2] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:40 P.M.)

THE COURT: THIS IS CAUSE NUMBER CR-119502 AND 125325, STATE VERSUS WARREN SUMMERLIN.

STATE READY?

MS. GIFFORD: READY, YOUR HONOR. JESSICA GIFFORD APPEARING FOR THE STATE.

THE COURT: DEFENSE READY?

MR. KLINK: DEFENDANT IS READY. GEORGE KLINK APPEARING ON BEHALF OF THE DEFENDANT.

THE COURT: WOULD YOU APPROACH THE BENCH, PLEASE, MR. SUMMERLIN? UP HERE.

I'LL ADDRESS HIM STANDING HERE.

OKAY, MR. SUMMERLIN, YOU CAN STEP BACK JUST A LITTLE BIT, PLEASE.

YOU'VE BEEN CHARGED BY THE STATE OF ARIZONA WITH THE CRIME OF MURDER, FIRST DEGREE, A CLASS 1 FELONY, AND SEXUAL ASSAULT, A CLASS 2 FELONY. AND YOU'VE BEEN FOUND GUILTY OF THESE CHARGES BY A JURY.

DO YOU HAVE ANYTHING TO SAY OR ANY LEGAL CAUSE TO SHOW WHY JUDGMENT AND SENTENCE SHOULD NOT NOW BE PRONOUNCED?

THE DEFENDANT: YES, SIR, I DO.

THE COURT: ALL RIGHT. FIRST OF ALL, ANY [3] LEGAL CAUSE?

MR. KLINK: NO LEGAL CAUSE, YOUR HONOR, THAT I'M AWARE OF, YOUR HONOR.

THE COURT: MR. SUMMERLIN, DO YOU HAVE ANYTHING TO SAY OR ANY LEGAL CAUSE?

THE DEFENDANT: YES, I DO HAVE. I'VE FILED A MOTION. IT'S ON HER DESK OVER THERE. I'D LIKE THE JUDGE TO TAKE A LOOK AT IT BEFORE PASSING SENTENCE.

THE COURT: ALL RIGHT. WELL, IT'S GOING TO TAKE ME FIVE MINUTES TO READ THIS, SO WE'LL RECESS FOR FIVE OR TEN MINUTES.

SO, WE'LL STAND IN RECESS WHILE I GO OVER THIS MOTION THAT – COUNSEL, HAVE YOU RECEIVED A COPY OF THIS?

MS. GIFFORD: NO, YOUR HONOR, I'VE NOT.

THE DEFENDANT: THERE IS ONLY ONE.

THE COURT: WE'LL STAND IN RECESS FOR FIVE MINUTES. I'LL MAKE IT AVAILABLE TO COUNSEL AFTER I'VE READ IT. STAND IN RECESS FOR FIVE MINUTES.

(A SHORT RECESS WAS HAD.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:50 P.M.)

THE COURT: IT'S A MOTION TO VACATE JUDGMENT BY MR. SUMMERLIN. I'VE READ IT. IS THERE ANYTHING ADDITIONAL ON THAT?

[4] MR. KLINK: I HAVE NOTHING, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL DENY THE MOTION.

MR. KLINK, DO YOU HAVE ANYTHING THAT YOU'D LIKE TO PRESENT?

FIRST OF ALL, STATE HAVE ANYTHING IT WOULD LIKE TO PRESENT AT THIS TIME?

MS. GIFFORD: BRIEFLY, YOUR HONOR. I HAVE FILED A MEMORANDUM, THAT I'M SURE THE COURT HAS RECEIVED, INDICATING WHY THE MAXIMUM SENTENCE SHOULD RUN CONSECUTIVELY ON THE SEXUAL ASSAULT CHARGE. THE STATE'S ASKING FOR 28 YEARS TO BE IMPOSED CONSECUTIVELY FOR THE OTHER CHARGES THAT – THE OTHER SENTENCE HE'S SERVING.

AND I SET OUT SEVERAL AGGRAVATING CIRCUMSTANCES THERE: THE INFLICTION OF SERIOUS PHYSICAL INJURY, THE USE OF A DANGEROUS INSTRUMENT DURING THE CRIME, HIS LONG HISTORY, INCLUDING PRISON CONFINEMENT IN THE PAST, HASN'T AFFECTED HIM ON PROBATION, WHILE HE COMMITTED THESE CRIMES ON THE VICTIM.

JUST BRIEFLY, ON THE MURDER ISSUE THE STATE IS SEEKING THE DEATH PENALTY FOR THIS CRIME. WE HAVE ESTABLISHED, I BELIEVE BEYOND A REASONABLE DOUBT, TWO AGGRAVATING CIRCUMSTANCES.

EXHIBIT NUMBER 1 IS A PACKET OF DOCUMENTS [5] THAT WAS MARKED LAST FRIDAY, THAT INCLUDES THE INDICTMENT FOR AGGRAVATED ASSAULT IN CR-119567, INDICATING THAT HE WAS

CHARGED WITH USING A KNIFE AND INTENTIONALLY PLACING MARY LEYVAS IN REASONABLE APPREHENSION OF IMINENT [sic] PHYSICAL INJURY.

AND THE MINUTE ENTRIES ATTACHED TO THAT, WITH THE STATUTORY CITATIONS, CLEARLY INDICATE THAT HE'S BEEN CONVICTED OF THE FELONY INVOLVING A THREAT OR USE OF VIOLENCE ON ANOTHER PERSON. THAT ESTABLISHES BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCE F-2.

I'VE ALSO SET OUT, IN LENGTH, IN THE MEMORANDUM, THE REASONS THE STATE FEELS THIS IS A CRUEL, HEINOUS, DEPRAVED MURDER. AND JUST BREIFLY [sic] LET ME EMPHASIZE THE TERROR THIS YOUNG WOMAN MUST HAVE GONE THROUGH BY FIRST BEING RAPED AND THEN BRUTALLY ATTACKED; THE PAIN SHE MUST HAVE EXPERIENCED, PHYSICAL AND MENTAL.

THERE WAS THE DOCTOR'S TESTIMONY THAT THERE WAS A DEFENSIVE BLOW TO HER HAND, PROTECTIVE BLOW TO PROTECT HER FROM THE BLOWS COMING TO HER HEAD. IT'S HEINOUS AND DEPRAVED FOR THE FACT THAT HE ABSOLUTLY [sic] CRUSHED HER SKULL AS THE PHOTOGRAPHS INDICATE.

THE FORCE OF THE BLOWS NECESSARY TO GO [6] THROUGH HER HEAD AND CRUSH HER SKULL, THE DEPRAVITY IN USING HIS CHILDREN TO TAKE UP THE FLOOR TILE AND PUT THOSE IN THE TRASH, AND USING HIS OWN LITTLE GIRL'S BLANKET TO WRAP HER UP IN, AND ALSO THE DEPRAVITY OF NOT EVEN COVERING HER BODY AND JUST

STUFFING HER IN THE TRUNK TO BE FOUND LATER ON.

I BELIEVE WE HAVE SHOWN THOSE TWO AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

THE COURT: MR. KLINK?

MR. KLINK: THANK YOU, YOUR HONOR. YOUR HONOR, I WANT TO ADDRESS MYSELF TO TWO MATTERS WITH REGARD TO MITIGATION, BOTH OF WHICH WERE ADDRESSED IN THE PRESENTENCE REPORT, AND ONE OF WHICH WAS ADDRESSED BY THE TESTIMONY OF THE EXPERTS.

YOU HAVE IN THE PRESENTENCE REPORT THE REPORT OF DR. TATRO. YOU HEARD TWO WITNESSES CALLED BY THE STATE, DR. BENDHEIM AND DR. TUCKLER. AND I BELIEVE YOU HEARD TESTIMONY, AND YOU REVIEWED IN THAT PRESENTENCE REPORT, THE KIND OF PSYCHIATRIC PROBLEMS THAT THIS INDIVIDUAL HAS.

GRANTED, THEY MAY NOT BE SIGNIFICANT ENOUGH TO JUSTIFY AN INSANITY DEFENSE. BUT IT SEEMS TO ME THAT THE TESTIMONY YOU HEARD AND THE REPORT OF DR. TATRO THAT YOU REVIEWED IS OVERWHELMINGLY SUPPORTIVE OF A MITIGATING FACTOR THAT THIS COURT [7] SHOULD FIND.

AND THAT IS THAT THIS INDIVIDUAL APPEARS TO BE A CLASSIC IRRESISTIBLE IMPULSE PERSONALITY. DR. BENDHEIM HIMSELF SAID, AND DR. TUCKLER HIMSELF SAID, THAT ONCE THIS INDIVIDUAL SETS INTO ACTION, AS A RESULT OF

EXTERNAL STIMULI OR INTERNAL STIMULI, WHICH THEY DID NOT KNOW, THAT THE LOGICAL CONCLUSION OF THOSE EVENTS ARE BEYOND HIS CONTROL.

AND DR. BENDHEIM INDICATED TO YOU THAT THERE IS A FOURTH PROFESSIONAL, WHO HAS INDICATED THE PSYCHOMOTIVE EPILEPSY ABOUT WHICH YOU HEARD TESTIMONY FRIDAY. AND I THINK DR. TATRO'S REPORT SUMS IT UP VERY CLEARLY, AND VERY SUCCINCTLY.

THIS INDIVIDUAL IS DEEPLY EMOTIONALLY AND MENTALLY DISTURBED, UNAWARE OF THE MOTIVES UNDERLYING HIS BEHAVIOR, AND UNABLE, BECAUSE OF HIS PROBLEMS, TO EXERCISE RESTRAINT IN A NORMAL WAY OR CONTROL, ONCE HIS HIGHLY UNSTABLE AND VOLITILE [sic] EMOTIONS ARE AROUSED.

AND THEREFORE, THIS SHOULD BE TAKEN INTO CONSIDERATION AS A MITIGATING FACTOR. AND THEN THE DIAGNOSIS THAT DR. TATRO MADE, BORDERLINE PERSONALITY DISORDER, CHARACTERIZED BY GREAT IMPULSIVITY AND UNPREDICTIBILITY, THE HALLMARK OF THAT DISORDER, PARANOID PERSONALITY DISORDER, INDICATIONS OF ORGANIC BRAIN IMPAIRMENT, PROBABLY RESPONSIBLE FOR THE [8] DEFENDANT'S DEVELOPMENTAL READING DISORDER, AND WHICH MAY VERY WELL UNDERLIE SOME OF THE DIFFICULTY HE HAS KEEPING HIS IMPULSE UNDER CONTROL.

IN ADDITION, I MIGHT POINT OUT TO YOU, NOW YOU'VE HAD AN OPPORTUNITY, AS I HAVE, TO REVIEW THAT PRESENTENCE REPORT, TO WHICH

THERE ARE MANY, MANY, MANY ATTACHMENTS BY CITIZENS IN THIS COMMUNITY, NONE OF WHOM ARE OBJECTIVE, BUT ALL OF WHOM, AS I READ THOSE REPORTS – ASK YOURSELF THE QUESTION, WHERE IS THE REQUEST THAT THIS MAN'S LIFE BE TAKEN? I DIDN'T SEE IT.

I KNOW THE PROBATION OFFICER SAID MARVIN RIGSBY THINKS HE SHOULD GET THE DEATH PENALTY. BUT IF YOU REVIEW MARVIN RIGSBY'S LETTER OF DECEMBER THE 9TH, 1981, THERE IS NO INDICATION THERE THAT A DEATH PENALTY IS REQUESTED. GRANTED, THIS MAN MAY BE A DANGER TO SOCIETY, BUT WOULD NOT SOCIETY BE SERVED BY IMPOSITION OF THE LESSER PENALTY?

THANK YOU.

THANK YOU.

THE COURT: WOULD YOU APPROACH THE BENCH, PLEASE, MR. SUMMERLIN? NO LEGAL CAUSE APPEARING, BY REASON OF THE VERDICT OF THE JURY, IT IS THE JUDGMENT OF THIS COURT THAT YOU'RE GUILTY OF THE CRIMES OF MURDER FIRST DEGREE, A CLASS 1 FELONY, AND SEXUAL ASSAULT, A CLASS 2 FELONY.

[9] AS TO SEXUAL ASSAULT, A CLASS 2 FELONY, THE COURT FINDS THE FOLLOWING AGGRAVATING CIRCUMSTANCES – AGGRAVATING FACTORS AS TO THIS CHARGE: FIRST, THE INFLICTION OF SERIOUS PHYSICAL INJURY; TWO, THE USE, THREATENED USE, OR POSSESSION OF A DANGEROUS INSTRUMENT DURING THE CRIME; THIRD, THAT THE CRIME WAS COMMITTED IN A CRUEL, HEINOUS, AND DEPRAVED MANNER; AND FOUR, A LONG

PRIOR RECORD, INCLUDING PRISON TERMS; AND FURTHER, THAT THE DEFENDANT WAS ON PROBATION AT THE TIME OF THE CRIMES.

AS TO THE SPECIAL VERDICT ON MURDER FIRST DEGREE, AND AS TO THE AGGRAVATING CIRCUMSTANCES FOR MURDER FIRST, THE COURT FINDS THE FOLLOWING: FIRST, THAT THE DEFENDANT HAS NOT BEEN CONVICTED OF ANOTHER OFFENSE IN THE UNITED STATES FOR WHICH, IN ARIZONA LAW, A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE.

THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF A FELONY IN THE UNITED STATES INVOLVING THE USE OR THREAT OF VIOLENCE ON ANOTHER PERSON, TO WIT: AGGRAVATED ASSAULT, A CLASS 3 FELONY, MARICOPA COUNTY CR-119567, ON MARCH 24TH 1982.

THIRD, IN THE COMMISSION OF THE OFFENSE THE DEFENDANT DID NOT CREATE A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

[10] FOUR, THE DEFENDANT DID NOT PROCURE THE COMMISSION OF THE OFFENSE BY PAYMENT OR PROMISE OF PAYMENT OF ANYTHING OF PECUNIARY VALUE.

FIVE, THE DEFENDANT DID NOT COMMIT THE OFFENSE AS CONSIDERATION FOR THE RECEIPT, OR AN EXPECTATION OF THE RECEIPT, OF ANYTHING OF A PECUNIARY VALUE.

SIX, THE DEFENDANT COMMITTED THE OFFENSE IN AN ESPECIALLY HEINOUS, CRUEL, AND

DEPRAVED MANNER. THE KILLING WAS CRUEL. THE VICTIM RECEIVED A DEFENSIVE BLOW TO HER RIGHT HAND. THE VICTIM SUFFERED PAIN, AND MENTAL TERROR DURING AND PRIOR TO THIS BLOW.

SHE EXPERIENCED MENTAL TERROR WHILE BEING RAPED BY THE DEFENDANT, AND OBVIOUSLY EXPERIENCED THEN ACTUAL DANGER DURING THE RAPE AND DURING THE MURDER AS SEE [sic] TRIED TO DEFEND HERSELF.

THE KILLING WAS ALSO HEINOUS AND DEPRAVED, FOCUSING ON THE DEFENDANT'S MENTAL STATE. THE EVIDENCE SHOWS HE ABSOLUTELY CRUSHED THE VICTIM'S SKULL FROM ALL SIDES AFTER HE RAPED HER. THIS WAS A HEINOUS AND DEPRAVED MURDER.

SEVEN, THE DEFENDANT DID NOT COMMIT THE OFFENSE WHILE IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS, LAW ENFORCEMENT AGENCY OR A COUNTY OR CITY JAIL.

[11] AS TO THE MITIGATING CIRCUMSTANCES, THE COURT FINDS THE FOLLOWING: FIRST, THE DEFENDANT'S CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT, OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF THE LAW, WAS NOT SIGNIFICANTLY IMPAIRED, AND CERTAINLY NOT SO IMPAIRED AS TO CONSTITUTE A DEFENSE TO THE PROSECUTION.

SECOND, THE DEFENDANT WAS NOT UNDER UNUSUAL OR SUBSTANTIAL DURESS. IN FACT, THERE WAS NO EVIDENCE OF DURESS AT ALL.

THIRD, THE DEFENDANT WAS THE INDIVIDUAL WHO ACTUALLY COMMITTED THE OFFENSE, AND WAS NOT FOUND GUILTY BY REASON OF BEING LEGALLY ACCOUNTABLE FOR THE CONDUCT OF ANOTHER, UNDER THE PROVISIONS OF ARS 13-303.

THEREFORE, THIS MITIGATING CIRCUMSTANCE DOES NOT EXIST. THE DEFENDANT COULD REASONABLY HAVE FORESEEN THAT HIS CONDUCT IN THE COURSE OF THE COMMISSION OF THE OFFENSE FOR WHICH HE WAS CONVICTED WOULD CAUSE OR CREATE A GRAVE RISK OF CAUSING DEATH TO ANOTHER PERSON.

THE DEFENDANT'S AGE IS NOT A MITIGATING FACTOR.

THE COURT – HAVING TAKEN INTO ACCOUNT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, THE [12] COURT FINDS THAT TWO AGGRAVATING CIRCUMSTANCES EXIST, AND THE COURT FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

AS PUNISHMENT FOR THE CRIME OF SEXUAL ASSAULT, IT IS ORDERED THAT YOU BE SENTENCED TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 28 YEARS, TO DATE FROM THIS DATE, WITH CREDIT FOR 434 DAYS TIME SERVED, TO RUN CONSECUTIVELY TO ANY OTHER PUNISHMENT IMPOSED BY THIS COURT.

AS PUNISHMENT FOR THE CRIME OF MURDER, FIRST DEGREE, IT IS ORDERED THAT THE SHERIFF OF MARICOPA COUNTY DELIVER YOU TO THE

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THERE FOR YOU TO SUFFER DEATH, IN THE MANNER PRESCRIBED BY LAW.

THE CLERK IS ORDERED TO FILE A NOTICE OF APPEAL ON BEHALF OF THE DEFENDANT.

THIS COURT WILL STAND IN RECESS.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. WARREN WESLEY SUMMERLIN, Appellant.	Supreme Court No. 5612 Maricopa County Superior Court Nos. CR-119502 and CR-125325

APPELLANT'S OPENING BRIEF

(Filed Jan. 27, 1983)

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Attorney for Appellant

* * *

ARGUMENT V

The Arizona procedure for imposition of the death penalty leaves all of the decisions upon which the penalty is predicated in the hands of the judge alone. A.R.S. §13-703. The defendant contends that this denies him his right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution. The aggravating factors found by the trial judge to justify imposition of the death penalty in Summerlin were that the defendant had been previously convicted of a felony in the United States of use of threat or violence to another person and that the defendant committed the offense in an especially heinous, cruel and depraved manner. (RA 92) The second of these

aggravating factors is a factual determination about the nature of the crime rather than a determination about the nature of the defendant and his background. The defendant, therefore, relies upon *State v. Quinn*, 50 Or. App. 383, 623 P.2d 630 (1981) where the court said, in striking down the Oregon statute:

> " . . . the facts which constitute the crime are for the jury and those which characterize the defendant are for the judge." 623 P.2d at 643.

* * *

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675 P.2d 686

STATE of Arizona, Appellee,

v.

Warren Wesley SUMMERLIN, Appellant.

No. 5612.

Supreme Court of Arizona,
In Banc.

Nov. 21, 1983.

Reconsideration Denied Jan. 17, 1984.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jessica Gifford Funkhouser, Asst. Attys. Gen., Phoenix, for appellee.

Kemper & Henze by James Hamilton Kemper, Phoenix, for appellant.

CAMERON, Justice.

Defendant, Warren Wesley Summerlin, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, and sexual assault, A.R.S. § 13-1406. The defendant was sentenced to death for the murder, A.R.S. § 13-703, and to twenty-eight years for the sexual assault, both sentences to be served consecutively. An automatic appeal to this court followed pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Was defendant's motion to suppress evidence obtained pursuant to a search warrant properly denied?

II. Did the trial court improperly comment on the evidence in front of the jury?

III. Was the trial court's admission into evidence of eight autopsy photographs of the victim erroneous?

IV. Was the defendant's anti-marital fact privilege violated?

V. Does defendant have a right to a jury determination of factual questions that lead to imposition of the death penalty?

VI. Is the Arizona death penalty statute unconstitutional because it fails to provide guidance for weighing and balancing aggravating and mitigating circumstances?

VII. Does this court find in its independent review that the death penalty was appropriate in this case?

VIII. Is the death penalty in this case proportionate to the disposition of other similar cases?

The facts necessary for a resolution of these issues are as follows. At approximately 8:30 a.m. on 29 April 1981 the victim left her place of business (Finance America) in Tempe, Arizona. The victim was a delinquent-account investigator, and was occasionally required to personally visit the residences of persons whose accounts were delinquent and who could not be reached by phone. On this particular day, her agenda included visits to two residences, the first visit being to the residence of defendant, Warren Summerlin. Upon completing a visit, the victim routinely called back to Finance America and

notified her superior of her whereabouts. On this particular day Mr. Buchanan, the victim's superior, never received such a call.

Marvin Rigsby, the victim's boyfriend, typically spoke with the victim several times during the day while she was at work. When he called Finance America and learned that she had not returned or called the office after leaving that morning, he asked for and received from Mr. Buchanan the addresses that the victim was supposed to visit that day. Mr. Rigsby arrived at defendant's house at approximately 5 p.m. and spoke with the defendant. Mr. Rigsby described the victim and asked the defendant if anyone resembling her had visited defendant that day. Defendant answered affirmatively, stating that the victim left his house at approximately 10:30 a.m. After leaving defendant's residence, Mr. Rigsby drove to the second address. The woman residing at this address told Mr. Rigsby that she had been home all day, and had not received a visit from anyone. That evening Mr. Rigsby relayed the preceding information to the police.

That same evening, Officer Brunk received an anonymous "Silent Witness" call concerning the present case. The female caller stated that she had information concerning the woman from "Pacific Finance Company" who was reported missing. The caller further stated she thought that this woman had been killed by Warren Summerlin, who resided at 3342 West Willetta in Phoenix, and that Mr. Summerlin had rolled up the victim's body in a carpet. The caller was later identified as the defendant's mother-in-law.

At approximately 5 a.m. the next day, Mr. William Goodman was working at the "Low Cost Market" at 35th

Avenue and Van Buren in Phoenix. At this time, a road paving crew directed his attention to a brown Mustang car parked in the parking lot of Mr. Goodman's store. Mr. Goodman, who had served in Vietnam, went outside to observe the car and recognized the odor of a decaying body. He also observed a pair of women's panties and shoes lying on the backseat of the car. Mr. Goodman walked back to his store and called the police.

Detective Klettlinger arrived at the parking lot to investigate. He forced open the lock of the trunk of the brown Mustang, later identified as the victim's car, and found the victim's dead body rolled up in a bedspread. The bedspread was covered with blood and contained green carpet tufts, sponge padding, and long red hairs. A piece of bloody plastic was also found with the body. The victim was nude from the waist down, and Detective Klettlinger observed a white milky substance on her genitalia.

Based upon the above information, Officer Davis of the Phoenix Police Department obtained a search warrant which was served at defendant's residence by Detective Klettlinger at approximately 5:30 p.m. on 30 April 1981. After serving the warrant, Detective Klettlinger seized carpeting and padding from inside the house, bloody men's boots and a hoe with hair on it resting by a door outside the house, and a bloody child's reader and bloody floor tiles in a garbage can outside the house.

Detective Fuqua, also of the Phoenix Police Department, accompanied Detective Klettlinger during the search of defendant's residence. Detective Fuqua read the search warrant to defendant, and the defendant said, "I didn't kill nobody." Detective Fuqua did not reply, and defendant asked, "Is this in reference to the girl that was

at my house?" Detective Fuqua asked, "What girl?", and the defendant stated "the lady that came to the house about 10:00 in the morning, reference to [my] wife's piano." The defendant was then advised of his rights, and indicated he understood these rights. During this time, defendant's wife identified the bedspread found with the victim as belonging to the Summerlin household.

Detective Klettlinger again advised defendant of his rights, arrested defendant, and transported him to the main Phoenix police station. At the police station, defendant asked to speak with his wife, and Detective Fuqua arranged this meeting. When Mrs. Summerlin arrived, Detectives Fuqua and Martinsen were present in the interviewing room. Defendant requested a private conversation with his wife, and Detective Fuqua told him this was impossible. While the detectives remained in the interviewing room, defendant proceeded to make several incriminating statements to his wife. After returning Mrs. Summerlin to her home at approximately 8:05 p.m., Mrs. Summerlin gave Detective Martinsen permission to further search the residence. Detective Martinsen seized some men's clothing that had been soaking in a bathtub and a towel was also seized. Mrs. Summerlin told Detective Martinsen about these items before they entered the house.

The defendant was tried and convicted by a jury and now appeals.

EVIDENCE FOUND PURSUANT
TO SEARCH WARRANT

The affidavit in support of the warrant read in part:

> IN SUMMARY, [THE VICTIM] was last known to have gone to 3342 West Willetta on a delinquent account for FINANCE OF AMERICA. She was to contact a MR. & MRS. SUMMERLIN who [lived] in the rear house at this address. [THE VICTIM] never showed up at her next appointment at 3843 West Abraham. A W/M at 3342 West Willetta (rear house) identified himself as the husband of MRS. SUMMERLIN. He said that [THE VICTIM] had contacted him at approximately 10 a.m., that morning, April 29, 1981, and had left. Silent Witness Call # 1594 advised that the SUSPECT is a WARREN SUMMERLIN, W/M, 32-35 years, and he may have killed the VICTIM. The VICTIM['S] body was found in the locked trunk of her car in the west parking lot at 3442 West Van Buren. Her keys, purse and credit cards are missing. The VICTIM was wrapped in a white plastic bed-liner cover, bed sheet or water bed liner. She had apparently been killed at another location, placed in the trunk of her car and driven to 3442 West Van Buren.

Defendant contends that the warrant was based on an anonymous tip and controlled by the "two-pronged" test established by the United States Supreme Court's decisions in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). We need not rely, however, upon the anonymous tip, as we believe that there were sufficient facts without the anonymous tip upon which to base a valid warrant. We agree, however, that an

informant who contacts the police through the Silent Witness program commands a greater expectation of reliability than the average police informant. *State v. Turney,* 134 Ariz. 238, 241, 655 P.2d 358, 361 (App.1982); *State v. Collins,* 21 Ariz.App. 575, 578, 522 P.2d 40, 43 (1974). Unlike the usual police informant who frequently seeks some favor from the police in return for his information, the silent witness generally wants nothing in return for his or her tip. Absent other evidence as to the corrupt motive of the anonymous caller, such an informant is considered reliable and credible. *Turney;* and *Collins,* supra.

Concerning probable cause, the Ninth Circuit Court of Appeals has stated that:

> affidavits are to be interpreted in a common sense and realistic manner, * * * and * * * probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of reasonable caution in the belief that the items to be seized were in the stated place, * * .

United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir.1970). When evaluating an affidavit, "[a] search warrant may not be issued unless the issuing magistrate has probable cause to believe a crime was committed * * * ." *State v. Berge,* 130 Ariz. 135, 136, 634 P.2d 947, 948 (1981) (citation omitted). See also *United States v. Ventresca,* 380 U.S. 102, 108-09, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965) (cited in *Berge,* supra, with approval); *State v. Hale,* 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982).

In the instant case, probable cause existed to believe that the victim's missing keys, purse, and credit cards might be found at the defendant's residence. A missing

person report on the victim had been filed by Mr. Rigsby, stating that the victim had left her office that morning to call on the Summerlin residence, and had not been heard from again. Her employer, Mr. Buchanan, verified that it was customary for the victim to call the office after completing a call on a delinquent account and that the victim did not do this during the morning in question. Mr. Rigsby visited the house where the victim was to make her second call of the day, and was told by the occupant that the victim had never arrived at the house. The body of the victim had been found, and murder was unquestionably the cause of her death. We believe there was indeed probable cause to issue a warrant to search defendant's residence, even without the anonymous call.[1]

Defendant contends further that the court should have suppressed the items retrieved from defendant's bathroom after defendant was taken to the police station. These items were found by the police after defendant's wife consented to a further search of the house. We have stated that:

> It is well settled that a warrantless search of property is valid if conducted pursuant to a voluntary consent. *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *State v. Tucker,* 118 Ariz. 76, 78, 574 P.2d 1295, 1297 (1978), *cert. denied,* 439 U.S. 846, 99 S.Ct. 144, 58 L.Ed.2d 147 (1978). "A consent to search

[1] We therefore do not consider the applicability of *Illinois v. Gates,* ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Although Gates is applicable to search warrants obtained after the date of its issuance (8 June 1983), the opinion is silent as to whether it should be applied retroactively.

> may be evidenced by conduct as well as by words. However, the constitutional protection against unreasonable searches demands a waiver by unequivocal words or conduct expressing consent." *State v. Tucker, supra,* 118 Ariz. at 78-79, 574 P.2d at 1297-98. These same principles apply where the consent is given by one who possesses common authority over the premises or effects. In such a situation, the consent is valid as against the absent, non-consenting person with whom that authority is shared. *United States v. Matlock, supra,* 415 U.S. at 171, 94 S.Ct. at 993.

State v. Schad, 129 Ariz. 557, 563, 633 P.2d 366, 372 (1981). Accord, *United States v. Long,* 524 F.2d 660, 661 (9th Cir.1975); *Yuma County Attorney v. McGuire,* 111 Ariz. 437, 438, 532 P.2d 157, 158 (1975). The wife had common authority over the house, and her consent was valid against the defendant. *State v. Schad,* supra. We find no error.

"COMMENTING" ON THE EVIDENCE

During jury selection, the following transpired:

> THE COURT: * * * As you heard me call the case it's entitled the State of Arizona versus Warren Wesley Summerlin. This is a criminal case, in which the defendant is accused by the State of Arizona of, on the date of April 29th, 1981, having sexually assaulted and murdered [the victim].
>
> Have any of you heard about this case, formed any opinions about it, or heard about it by any information on the news media?

I might again say that this will be the first time that I'm hearing the facts, just as it will be the first time that you folks are hearing the facts. But as I understand, and counsel can correct me, it has been in the news media before.

It concerned, I believe, a collection agent or a bill collector, who was the decedent, and the attempt by her to go out to the defendant's residence, and at that time the incident took place.

Is that basically, as a very rough sketch, just to give the jury an idea where we are at?

MS. GIFFORD: That's close, Your Honor.

THE COURT: Counsel, is that fair, Mr. Klink?

MR. KLINK: Well, may we approach the bench?

THE COURT: Yes.

* * *

MR. KLINK: Sorry to break this up here, Your Honor. I believe you've related some facts that are not in the indictment, and I believe that is an improper comment on the evidence.

THE COURT: What facts are those?

MR. KLINK: Well, those were that the bill collector had gone out to the defendant's home to collect a bill. And while there may or maybe be testimony about that. I believe it is a comment on the evidence, and on that basis I would move for a mistrial at this point in time.

THE COURT: I'll deny your motion. * *

* * *

(The following proceedings were held in open court in the presence of the jury.)

THE COURT: As I indicated, the event took place at 33 – or was alleged to have taken place at 3342 West Willetta.

Are any of you aware or familiar with this incident or have heard about it or read about it in the media?

Defendant alleges that these statements made by the trial judge to the jury were improper comments concerning disputed evidence. Under our state Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. Art. 6, § 27. We have stated that:

> The purpose of Art. 6, § 27 is to prohibit the judges from expressing their opinion as to evidentiary matters. The constitutional provision does not forbid a trial court from making reference to the evidence, but it does forbid comment. The word comment as used in the constitutional provision has been construed to mean the expression of opinion.

State v. Barnett, 111 Ariz. 391, 393, 531 P.2d 148, 150 (1975) (citations omitted). *E.g., State v. Britson,* 130 Ariz. 380, 385, 636 P.2d 628, 633 (1981); *State v. Barnes,* 124 Ariz. 586, 590, 606 P.2d 802, 806 (1980).

Defendant first contends that the trial judge's statement that, "It concerned, I believe, a collection agent or bill collector, who was the decedent, and the attempt by her to go out to the defendant's residence, and at that time the incident took place," constituted a comment on the evidence. We do not agree. The judge was not commenting on the evidence, but was giving the jury a factual background in order to determine whether any of the jurors should be excluded from jury duty. For such purpose, some statement of the facts is necessary. The judge did not indicate that the victim did visit, but rather he "believe[d]" and she "attempted" to visit. While "alleged attempt" might have been better phrasing than just the word "attempted" used alone, we do not find that this indicated to the jury an opinion by the court that the victim did, in fact, visit the defendant's residence, and we find no prejudice to the defendant.

Secondly, the defendant alleges that the statement "As I indicated, the event took place at 33 – or was alleged to have taken place at 3342 West Willetta" was also a comment on the evidence. We cannot agree that the words "the event took place at," which were immediately changed to, "was alleged to have taken place at" as soon as they were spoken, so prejudiced the minds of the jury that they were precluded from acting impartially towards defendant. Even if this statement could be considered a comment on the evidence, such "comment" was negated by the words which followed, and the resulting error, if any, was not prejudicial.

ADMISSION INTO EVIDENCE OF AUTOPSY PHOTOGRAPHS

Defendant alleges that eight autopsy photographs of the victim were admitted into evidence solely to prejudice the jury. The photographs show various gashes to the victim's skull, and none of the photographs were repetitive. We have stated that:

> [G]ruesome or inflammatory evidence may be admitted if it is material to some aspect of the case. * * * In such circumstances, the trial court must determine whether the probative value of the evidence outweighs its potential to prejudice the jury.

State v. Gerlaugh, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982), supplemented in 135 Ariz. 89, 659 P.2d 642 (1983) (citations omitted). *E.g., State v. Hicks,* 133 Ariz. 64, 69, 649 P.2d 267, 272 (1982); *State v. Schad,* 129 Ariz. 557, 571-72, 633 P.2d 366, 380-81 (1981); *State v. Steele,* 120 Ariz. 462, 464, 586 P.2d 1274, 1276 (1978). Gruesome photographs are properly admissible for a variety of reasons. We have stated that:

> In *State v. Thomas,* 110 Ariz. 120, 515 P.2d 865 (1973), we identified the following uses for which photographs of a corpse may be admitted in a homicide prosecution: to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed. *Id.* at 130, 515 P.2d at 875.

State v. Chapple, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). *E.g., State v. Gerlaugh,* supra, 134 Ariz. at 169, 654 P.2d at 805; *State v. Hicks,* supra, 133 Ariz. at 69, 649 P.2d at 272; *State v. Schad,* supra, 129 Ariz. at 571-72, 633 P.2d at 380-81. The State argues that the pictures were admitted to show premeditation and to help one of the State's witnesses explain his testimony. The trial court agreed with the State, and we will not disturb such a ruling on appeal unless the trial court has clearly abused its discretion. *State v. Gerlaugh,* supra, 134 Ariz. at 169, 654 P.2d at 805. *Accord, State v. Ferrari,* 112 Ariz. 324, 333, 541 P.2d 921, 930 (1975). After reviewing the record and viewing the photographs, we find that none of the autopsy photographs introduced at trial were repetitive, and each illustrated an important piece of evidence when considering the issue of premeditation. The state's witness testified that any one of the blows to the victim's head was sufficient to kill the victim, yet numerous, deep lacerations were evident from the photographs. We believe defendant's excessive and purposeful actions demonstrate more than just a "reactionary" homicide. The photographs were a visual record of defendant's intent, were relevant as to defendant's premeditation, and were properly admitted at trial. Additionally, the state's witness testified that the pictures were a helpful testimonial aid. In light of the above, we hold that the trial court did not abuse its discretion in admitting the photographs.

ANTI-MARITAL FACT PRIVILEGE

Detective Fuqua gave the following testimony at trial:

> [Detective Fuqua]: When Mr. Summerlin's wife came into the room she sat down next to me, putting her directly across from him. And he

> made a statement "I knew this had to happen."
>
> * * *
>
> His wife responded "What do you mean?" And he then stated "This was the big crime."
>
> * * *
>
> His last statement he stated was, quote, "I don't like to pay bills and all the other bullshit," unquote.
>
> * * *
>
> Then he told her just prior to the end of the interview, that – not for her to worry, because the police wouldn't find anything in the house.

Defendant asserted that his anti-marital fact privilege was violated when the police officer so testified. The relevant statute read in pertinent part:

> A person shall not be examined as a witness in the following cases:
>
> 1. A husband for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without consent of the other, examined as to any communication made by one to the other during the marriage * * * . [Former] A.R.S. § 13-4062.

This statute prevents the calling of one spouse to testify against the other; it does not apply to conversations between husband and wife that are overheard by a third party. Because defendant asked for privacy, which was expressly denied by the police, defendant asserted that

everything he said during the conversation with his wife at the police station was privileged. We do not agree. Defendant Summerlin was warned by the police officers that he could not meet privately with his wife. Since the officers stood in the same room with defendant and his wife, defendant should have known that he risked the officers hearing part or all of his conversation. We have previously ruled on this issue in a case with a fact situation very similar to the present case:

> Officer Smith testified to a conversation he overheard between defendant and his wife while in the Sheriff's office. * * * [The officer] overheard Mrs. Narten say to the defendant: "Karl, you must tell me the truth" to which the defendant replied: "What do you want to do, send me to the gas chamber?" It is argued that Officer Smith's testimony was admitted in violation of the anti-marital fact privilege. [Former] § 13-1802 A.R.S. In *De-Leon v. Territory,* 9 Ariz. 161, 80 P. 348 this court held that the defendant waived the privilege when he wrote a letter from jail to his wife knowing that the jailer would read it. Communications between husband and wife are generally not confidential when made in the presence of a third person. Rather, the husband and wife are incompetent witnesses.

State v. Narten, 99 Ariz. 116, 124, 407 P.2d 81, 87 (1965). *Accord, Narten v. Eyman,* 460 F.2d 184, 191 (9th Cir.1969) (upholding *State v. Narten,* supra). Defendant further contends, however, that the case of *State v. Barnhart,* 73 Wash.2d 936, 442 P.2d 959 (1968), supports his position. We do not agree. In Barnhart, the court stated:

> Another error is directed against the admission of a statement made by appellant to his wife, over the sheriff's telephone, in the presence of the sheriff's secretary. There was no testimony that the appellant objected to talking to his wife in the presence of the secretary. He saw her sitting across the desk from him when the telephone connection had been made. A statement in the presence of a third person, by a husband to his wife, loses its privileged character. If the communication is heard by a third person, even if an eavesdropper, the third person may testify to it, since the privilege protects only successful confidences. (citation omitted) Consequently, the statement made, as related by the sheriff's secretary, was properly admissible.

Id. 442 P.2d at 961-62. We hold that defendant's anti-marital fact privilege was not violated.

IMPOSITION OF THE DEATH PENALTY UNDER A.R.S. § 13-703

Defendant next alleges that our state death penalty statute, A.R.S. § 13-703, is unconstitutional because it requires that the trial judge determine whether to impose the death penalty. Within the last decade, the United States Supreme Court has addressed this issue:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois,* 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 [n. 15], 20 L.Ed.2d 776, [783] (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should

> lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913, 922-23 (1976) (footnote omitted). We have expressly followed the mandate of Proffitt in rejecting similar arguments that there is a right under the Sixth Amendment of the United States Constitution to have a jury participate in the capital sentencing decision. *State v. Gretzler,* 135 Ariz. 42, 56, 659 P.2d 1, 15 (1983) and cases cited therein. See also, *Richmond v. Cardwell,* 450 F.Supp. 519, 523 (D. Ariz. 1978); *State v. Lambright,* 138 Ariz. 63, 673 P.2d 1 (1983). We find no error.

WEIGHING AND BALANCING AGGRAVATING AND MITIGATING CIRCUMSTANCES UNDER A.R.S. § 13-703

Defendant further attacks A.R.S. § 13-703, stating that the statute does not provide uniform standards for weighing and balancing aggravating and mitigating circumstances, resulting in arbitrary and capricious imposition of the death penalty. We disagree with the defendant for the reasons set forth in *State v. Gretzler,* supra, 135 Ariz. at 53-55, 659 P.2d at 12-14. *Accord, State v. Lambright,* supra, 138 Ariz. at 63, 673 P.2d 1.

INDEPENDENT REVIEW CONCERNING AGGRAVATING AND MITIGATING CIRCUMSTANCES

Under A.R.S. § 13-703, this court is required to conduct an independent review of the trial court's decision concerning the balancing of aggravating and mitigating circumstances. *State v. Gretzler,* supra, 135 Ariz. at 57, 659 P.2d at 16. We have done so and conclude that the trial court correctly found two aggravating circumstances and no mitigating circumstances sufficient to call for leniency. The two aggravating circumstances were that the defendant had previously been convicted of a felony in the United States involving the use or threat of violence on another person, A.R.S. § 13-703(F)(2), and that the defendant committed the offense in an especially heinous, cruel, or depraved manner. A.R.S. § 13-703(F)(6). As concerning this second circumstance we have stated that, "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler,* supra, at 51, 659 P.2d at 10. Evidence of the victim's bruised hand indicates that she attempted to ward off blows. This evidence and the evidence of rape are indications of physical and mental pain. These acts constitute cruelty. As for defendant's state of mind, we must consider such things as defendant's "apparent relishing of the murder," "inflicting of gratuitous violence on the victim," "needless mutilation of the victim," and "senselessness of the crime, and helplessness of the victim." *State v. Gretzler,* supra, at 52, 659 P.2d at 11. We find that all of the above-listed circumstances were present. The coroner who conducted the autopsy on the victim's body stated at trial that the several blows to the victim's head were far more in number than those needed to kill her. It is obvious from the battered condition of the

victim's body that she was incapable of defending herself. We find that two aggravating and no mitigating circumstances were present in this case, and that the death penalty is appropriate under A.R.S. § 13-703.

PROPORTIONALITY REVIEW

We must also consider whether imposition of the death sentence in this case is proportionate to imposition of the death sentence in similar cases. *State v. Gretzler,* supra, at 58, 659 P.2d at 17, and cases cited therein. One similar case is *State v. Jeffers,* 135 Ariz. 404, 661 P.2d 1105 (1983), where defendant lured an ex-girlfriend to his motel room by offering her heroin. The victim was given an overdose of heroin and passed out. She was then strangled and given another heroin injection. Defendant then beat the victim's dead body. *Id.* at 412, 661 P.2d at 1113. This court found that although the crime was not cruelly committed, it was committed in a heinous and depraved manner, and that the death penalty was properly imposed. *Id.* at 428-30, 661 P.2d at 1129-31. Another similar case is *State v. Zaragoza,* 135 Ariz. 63, 659 P.2d 22 (1983). There, defendant attempted to or did sexually assault the victim, and then murdered her by hitting her several times in the head with a blunt object. *Id.* at 65, 659 P.2d at 24. Two aggravating circumstances were found: two prior convictions of felonies involving the use or threat of violence, and a heinous or depraved mental state on defendant's part during the murder. Again, we upheld imposition of the death penalty. *Id.* at 69-71, 659 P.2d at 28-30.

Additionally, we have considered cases where the death penalty was reduced to life imprisonment, and find that the facts were significantly different from the facts in

this case. See *State v. Lujan,* 124 Ariz. 365, 604 P.2d 629 (1979) (victim's death not committed in heinous, cruel or depraved manner, so no aggravating circumstance found); *State v. Brookover,* 124 Ariz. 38, 601 P.2d 1322 (1979) (death penalty reduced to life imprisonment due to mitigating circumstance).

We have examined the entire record for fundamental error pursuant to A.R.S. § 13-4035 and find none.

Defendant's convictions and sentences for sexual assault and first degree murder are affirmed.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and FELDMAN, JJ., concur.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Plaintiff, vs. WARREN WESLEY SUMMERLIN, Defendant,	) No. CR-119502)) ATTACHMENT A:) FACTS IN SUPPORT) OF PETITION FOR) POST-CONVICTION) RELIEF (RULE 32))) (Filed May 11, 1988)

I. BACKGROUND

Petitioner, Warren Wesley Summerlin ("Summerlin"), was convicted of first degree murder and sexual assault on June 8, 1982. He was given an aggravated sentence of 28 years for the sexual assault. After an aggravation/mitigation hearing on July 8, 1982, at which two aggravating and no mitigating circumstances were found, Summerlin was sentenced to death for the murder. Summerlin's conviction and death sentence were affirmed on direct appeal to the Arizona Supreme Court on November 21, 1983. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983).

* * *

V. THE ARIZONA DEATH PENALTY STATUTE (A.R.S. § 13-703) IS UNCONSTITUTIONAL, GENERALLY, AND AS APPLIED TO SUMMERLIN'S TRIAL AND SENTENCE.

A. The Arizona death penalty statute unconstitutionally permits a finding of guilt or innocence of the crime of capital murder without a jury determination of all of the elements thereof, in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America. In addition, petitioner was denied a jury trial upon critical elements of the crime of capital murder by the Arizona courts in violation of his rights under the sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

A.R.S. § 13-1105 defines first degree murder. As applicable to this case, it provides that a homicide constitutes first degree murder when:

> 1. Knowing that his conduct will cause death, such person causes the death of another with premeditation; or
>
> 2. Acting either alone or with one or more other person, such person commits or attempts to commit sexual assault under § 13-1406 . . . and in the course of and in furtherance of such offense . . . such person . . . causes the death of any person.

Subsection (c) of A.R.S. § 13-1105 provides that first degree murder is punishable by death or life imprisonment as provided by § 13-703.

Although A.R.S. § 13-703 purports to relate only to sentencing and has frequently been called Arizona's "death penalty statute", by its inclusion in A.R.S § 13-1105, by its

terms and by its application in the State of Arizona, it creates two subclasses of first degree murder: Capital murder and non-capital murder. Capital murder consists of those first degree murders in which the court finds one or more of the aggravating circumstances enumerated in subsection (F) of A.R.S. § 13-703 and no mitigating circumstances or insufficient mitigating circumstances to call for leniency. Non-capital murder consists of all other first degree murders as well as second degree murders.

There are seven aggravating circumstances provided in subsection (F) of A.R.S. § 13-703. Subsection (F) (6) of that statute specifically provides that commission of the offense in "an especially heinous, cruel or depraved manner" constitutes an aggravating circumstance. Thus, the *circumstances of the homicide* are specifically made relevant to a determination whether the crime is capital murder or non-capital murder.

The Arizona courts have held (by inference) that aggravating circumstances are elements of the crime by requiring that they must be proved by competent evidence beyond a reasonable doubt. *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) aff'd 106 S. Ct. 1749, 90 L.Ed. 2d 123; *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). Mere labeling as "aggravating factors" rather than elements of the statutory offense does not change their essential function. *Mullaney v. Wilbur*, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The relevant question is not how the fact is labeled but whether it is an "ingredient of an offense . . . a fact which the state deems so important that it must be either proved or presumed. . . . " *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281

(1977). Here, the "aggravating factors" (at least as set forth in subsection (F) (6)) are elements of *mens rea*, "the requisite culpable mental state with which the crime was committed", among the most fundamental facts to which the right to jury trial applies. *State v. Quinn*, 623 P.2d 630 (Ore. 1981). Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element of the crime. *Mullaney v. Wilber*, *supra*; *State v. Quinn*, *supra*. *Cf.* A.R.S. § § 13-1102, 13-1102, 13-1104 and 13-1105 (defining negligent homicide, manslaughter, second degree murder and first degree murder, respectively); and A.R.S. § § 13-1203 and 13-1104 (defining assault and aggravated assault, respectively).

The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States require that in criminal cases due process of law includes the right to a jury trial upon all issues constituting the offense. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 39 (1979); *Morrissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *United States v. Battiste*, 2 Sumner 240 (1835).

A.R.S. § 13-703(B) provides that the determination of aggravating factors, including the aggravating factors set forth in subsection (F) (6), shall be heard "before the court alone" without a jury. Because that determination requires a factual inquiry into the circumstances of the homicide, including the acts of the defendant and his mental state at the time of the commission of the offense, without the right to a jury, the statute is unconstitutional, in violation of the Sixth, Eighth and Fourteenth Amendments.

The petitioner was sentenced under the statutory provisions set forth above and the trial court made a determination that the crime was committed "in an especially heinous, cruel or depraved manner" under subsection (F) (6) of the statute. That determination was made by the court, alone, without a jury, in violation of the petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The sentence must be set aside and a new pre-sentence hearing ordered which complies with the constitutional guarantee of a jury trial on all issues relating to elements of the offense upon which sentence is imposed.

* * *

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN, Petitioner vs. SAMUEL LEWIS, *et al*, Respondents	**NO. CIV 86-0584 PHX ROS** **SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS** (Filed Nov. 22, 1995)

TO THE UNITED STATES DISTRICT COURT for the District of Arizona:

1. The name and location of the Court that entered the judgment of conviction and sentence under attack are: The Superior Court of Maricopa County, Phoenix, Arizona, numbers CR 119502 and CR 125325.

2. The Judgment of conviction was entered on July 12, 1982 and affirmed by the Arizona Supreme Court on November 21, 1983.

* * *

1. The Arizona death penalty statute unconstitutionally permits a finding of guilt or innocence of the crime of capital murder without a jury determination of all of the elements thereof, in violation of the Sixth, Eighth and Fourteenth Amendment [sic] **to the Constitution of the United States of America. In addition, Petitioner was denied a jury trial upon critical elements of the crime of capital murder by the Arizona courts in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.**

A.R.S. § 13-1105 defines first degree murder. As applicable to this case, it provides that a homicide constitutes first degree murder when:

> 1. Knowing that his conduct will cause death, such person causes the death of another with premeditation; or
>
> 2. Acting either alone or with one or more other person, such person commits or attempts to commit sexual assault under § 13-1406 and in the course of and in furtherance of such offense such person causes the death of any person.

Subsection (c) of A.R.S. §13-1105 provides that first degree murder is punishable by death or life imprisonment as provided by §13-703.

Although A.R.S. §13-703 purports to relate only to sentencing and has frequently been called Arizona's "death penalty statute", by its inclusion in A.R.S §13-1105, by its terms and its application in the State of Arizona, it creates two subclasses of first degree murder: Capital murder and non-capital murder. Capital murder consists of those first degree murders in which the court finds one or more of the aggravating circumstances enumerated in subsection (F) of A.R.S. §13-703 and no mitigating circumstances or insufficient mitigating circumstances to call for leniency. Non-capital murder consists of all other first degree murders as well as second degree murders.

There are seven aggravating circumstances provided in subsection (F) of A.R.S. §13-703. Subsection (F)(6) of that statute specifically provides that commission of the offense in "an especially heinous, cruel or depraved manner" constitutes an aggravating circumstance. Thus, the *circumstances of the homicide* are specifically made relevant to a determination whether the crime is capital murder or non-capital murder.

The Arizona courts have held (by inference) that aggravating circumstances are elements of the crime by requiring that they must be proved by competent evidence beyond a reasonable doubt. *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) aff'd 106 S. Ct. 1749, 90, L.Ed. 2d 123; *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied* 449 U.S. 986 (1980). Mere labeling as "aggravating factors" rather than elements of the statutory offense does not change their essential function. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The relevant question is not how the fact is labeled but whether it is an "ingredient of an offense . . . a fact which the state deems so important that it must be either proved

or presumed. . . . " *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Here, the "aggravating factors" (at least as set forth in subsection (F)(6)) are elements of *mens rea*, "the requisite culpable mental state with which the crime was committed", among the most fundamental acts to which the right to jury trial applies. *State v. Quinn*, 623 P.2d 630 (Ore. 1981). Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element [sic] the crime. *Mullaney v. Wilber*, *supra*; *State v. Quinn*, *supra*. *Cf.* A.R.S. §§13-1102, 13-1103, 13-1104 and 13-1105 (defining negligent homicide, manslaughter, second degree murder and first degree murder, respectively); and A.R.S. §§ 13-1203 and 13-1104 (defining assault and aggravated assault, respectively).

The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States require that in criminal cases due process of law includes the right to a jury trial upon all issues constituting the offense. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) ; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *United States v. Battiste*, 2 Sumner 240 (1835).

A.R.S. §13-703(B) provides that the determination of aggravating factors, including the aggravating factors set forth in subsection (F)(6), shall be heard "before the court alone" without a jury. Because that determination requires a factual inquiry into the circumstances of the homicide, including the acts of the defendant and his mental state at the time of the commission of the offense, without the right to a jury, the statute is unconstitutional,

in violation of the Sixth, Eighth and Fourteenth Amendments.

The petitioner was sentenced under the statutory provisions set forth above and the trial court made a termination [sic] that the crime was committed "in an especially heinous, cruel or depraved manner" under subsection (F)(6) of the satute [sic]. That determination was made by the court, alone, without jury, in violation of the petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The sentence must be set aside and a new presentence hearing ordered which complies with the constitutional guarantee of a jury trial on all issues relating to elements of the offense upon which sentence is imposed.

* * *

No. 03-0526

Supreme Court, U.S.
FILED
JAN 15 2004
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In The
Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 589 (2002), this Court held that the Sixth Amendment's jury-trial guarantee extends to the determination of any fact, other than a prior conviction, that increases the maximum punishment for first-degree murder from life imprisonment to death. In this case, the United States Court of Appeals for the Ninth Circuit held that the rule announced in *Ring* applies retroactively to cases on collateral review.

1. Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)?

2. Did the Ninth Circuit err by alternatively holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment denying federal habeas relief on Summerlin's state death sentence. The unpublished district court order is reprinted at Appendix C of the Petition for Writ of Certiorari. The Ninth Circuit's opinion is published at *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), and reprinted at Appendix A of the Petition for Certiorari.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on September 2, 2003. Petitioner timely filed a Petition for Writ of Certiorari that this Court granted on December 1, 2003. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Nearly a quarter of a century ago, Respondent Warren Summerlin raped and murdered Brenna Jean Bailey. Ms. Bailey had gone to Summerlin's residence on behalf of her employer to discuss a delinquent debt. Summerlin bashed in Ms. Bailey's skull, wrapped her in a bedspread, and discarded her partially nude body in the trunk of her car. (Tr. 6/2/82, at 166-67, 176; Tr. 6/7/82, at 133, 156-57.) Following an investigation that inculpated Summerlin in the murder, the State charged him with sexual assault and first-degree murder. (Cert. Pet. App. A-3 to -4; App. 51.)

In June 1982, a jury convicted Summerlin of both charges. Following an aggravation/mitigation hearing, the trial court sentenced Summerlin to twenty-eight years' imprisonment for the sexual assault conviction and imposed the death penalty for the first-degree murder conviction. The trial court found two aggravating circumstances that rendered Summerlin eligible for a death sentence under Arizona's capital sentencing statute: (1) he had a prior felony conviction involving the use or threat of violence against another person; and (2) he had committed the murder in an especially cruel, heinous, or depraved

manner. (App. 45.) The court found no mitigating circumstances sufficient to call for leniency. (*Id.* at 46-47.)

On direct appeal, the Arizona Supreme Court affirmed Summerlin's convictions and sentences. (App. 71.) In its independent review of the trial court's imposition of the death penalty, the court confirmed the trial court's finding of two aggravating circumstances and no mitigating circumstances sufficient to call for leniency. (*Id.* at 69-70.)

Summerlin's direct appeal included an argument that Arizona's death penalty statute violated the Sixth Amendment's jury-trial guarantee because it left "all of the decisions upon which the penalty is predicated in the hands of the judge alone." (App. 49.) He further argued that the second aggravating circumstance involved "a factual determination about the nature of the crime rather than a determination about the nature of the defendant and his background." (*Id.* at 50.) In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court had upheld the constitutionality of Florida's death-penalty sentencing statute in which the judge, rather than the jury, made the final sentencing determination. Relying on *Proffitt*, the Arizona Supreme Court rejected Summerlin's argument. (App. 67-68.) Summerlin's direct appeal became final on April 17, 1984, when time elapsed for seeking certiorari review by this Court.

After unsuccessfully pursuing state post-conviction relief, Summerlin initiated federal habeas corpus proceedings in April 1986. The claims he raised in his habeas petition included an argument that having a court determine the aggravating circumstances underlying his death sentence violated the Sixth, Eighth, and Fourteenth Amendments. While the habeas proceeding was pending,

this Court decided *Walton v. Arizona*, 497 U.S. 639 (1990), expressly rejecting a Sixth Amendment challenge to Arizona's death-penalty sentencing scheme under which judges determined whether the state had established aggravating circumstances that exposed a defendant to the death penalty. Relying on *Walton*, the district court rejected this claim and denied relief on the habeas petition. (Cert. Pet. App. C-2, -23 to -24.)

In March 1998, Summerlin appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit, asserting this same Sixth Amendment claim, among others. Relying on *Walton*, a Ninth Circuit panel rejected the claim, but remanded the case for an evidentiary hearing based on a different claim. *Summerlin v. Stewart*, 267 F.3d 926, 956-57 (9th Cir. 2001), *op. withdrawn by* 281 F.3d 836 (9th Cir. 2002).

While this case was pending en banc review by the Ninth Circuit, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), reversing *Walton* and holding that the Sixth Amendment's jury-trial guarantee extends to the determination of facts, other than prior convictions, that make a defendant in a first-degree murder case eligible for the death penalty. *Ring* extended to the capital sentencing context this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any alleged fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. 536 U.S. at 609.

An en banc panel of the Ninth Circuit affirmed the district court's judgment concerning Summerlin's convictions, but vacated his death sentence, holding that the new rule announced in *Ring* applied retroactively to Summerlin's case. The Ninth Circuit majority offered two

alternative theories to justify this conclusion. First, the court found that *Ring* altered Arizona's substantive statutory law by creating a new crime of "capital murder." (Cert. Pet. App. A-28 to -41.) Second, the court held that even if *Ring* did not alter Arizona's substantive criminal law, it announced a new procedural rule that applied retroactively under an exception to the general principle that new procedural rules do not apply to cases on collateral review. In particular, the court found that *Ring* fell within an exception set forth in *Teague v. Lane*, 489 U.S. 288 (1989), for watershed rules that seriously enhance the accuracy of the proceeding and alter our understanding of bedrock procedural elements. (*Id.* at A-44 to -63.)

Three judges dissented from both holdings. (*Id.* at A-69 to -83.) In concluding that *Ring* announced a procedural rule, rather than a substantive one, the dissenters noted that the *Ring* rule is an application of the rule announced in *Apprendi*, which this Court has characterized as procedural: "In short, *Ring* changed the '*who*' of the capital sentencing determination, not the '*what*.'" (*Id.* at A-75; emphasis added.) The dissenting judges further opined that the majority's conclusion that *Ring* changed Arizona's substantive criminal law directly conflicted with the Arizona Supreme Court's authoritative construction of Arizona law. The state court had held that *Ring* did not change Arizona's substantive criminal law because it affected neither the facts necessary to establish aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt.

The dissenting judges also disagreed with the majority's alternative holding that if *Ring* announced a procedural rule, it nonetheless applied retroactively under the "watershed" exception. The dissenters noted that there

was no compelling evidence to support "the majority's facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process." (*Id.* at A-80.) The dissenters further found that *Ring* did not alter our understanding of bedrock procedural principles, noting that the majority based its conclusion to the contrary on its erroneous belief that *Ring* error was not subject to a harmless-error analysis. (*Id.* at A-82 to -83.)

On December 1, 2003, this Court accepted certiorari review of the Ninth Circuit's ruling to address two issues: (1) whether the rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from *Teague*'s retroactivity analysis, and (2) if the rule is procedural, whether it fits within the "watershed" exception to the general rule of nonretroactivity.

SUMMARY OF ARGUMENTS

When this Court announces a new substantive interpretation, it applies retroactively to all criminal cases regardless where they are in the process. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998). In contrast, new procedural rules do not apply retroactively to cases that are final on direct appeal at the time the rule is announced unless the rule corrects an error that seriously diminishes the fundamental fairness and accuracy of the proceedings. *Teague*, 489 U.S. at 311, 313 (plurality opinion). The new rule announced in *Ring* does not apply retroactively because it is procedural, rather than substantive, and does not call into question the fairness and accuracy of the trial or sentencing proceedings.

The Ninth Circuit's ruling that *Ring* made a substantive change in Arizona law does not withstand scrutiny. *Ring* did not change *what* is found, but only *who* finds it. *Ring* did not hold that first-degree murder was no longer a crime or that there was anything unclear or equivocal about any term defined in Arizona's first-degree murder statute. It did not substantively interpret a federal or state criminal statute. Nor did it address the definition of an aggravating factor or the quantum of proof necessary to establish its existence. *Ring* did not require the prosecution to prove anything more than it had to prove previously. To the contrary, it required the jury to find the identical facts (an aggravating circumstance) that the court formerly found under the identical standard (beyond a reasonable doubt). Because *Ring* did not change what is to be found at sentencing, but only who finds it, the new rule announced in *Ring* is procedural, not substantive.

The Ninth Circuit's ruling conflicts with this Court's characterization of the rule announced in *Apprendi* as procedural. In *Apprendi*, this Court held that removing from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed violates the Sixth Amendment. 530 U.S. at 490. *Ring* is an application of *Apprendi* to the capital sentencing context, and there is no principled basis for finding that *Apprendi* represents a procedural change for purposes of a retroactivity analysis, while finding that *Ring* is a substantive change under that same analysis.

Furthermore, the Ninth Circuit's conclusion that *Ring* altered the substantive statutory law of the State of Arizona invades the province of the Arizona Supreme Court to interpret Arizona statutes. The Arizona Supreme

Court has expressly ruled that *Ring* did not alter substantive criminal law in Arizona, and the Ninth Circuit erred by failing to defer to that ruling.

The Ninth Circuit further erred by alternatively holding that the new procedural rule announced in *Ring* fits within a narrow exception to *Teague*'s retroactivity bar for cases that implicate the fairness and accuracy of criminal proceedings. The decision below does not rest on any evidence that judicial fact-finding of aggravating circumstances in a capital case is less accurate than jury fact-finding of those circumstances. In fact, this Court presumes that judges consider all relevant sentencing information before them and properly apply the law. This Court has also noted that in the context of capital sentencing, judges may act more consistently than jurors. *Proffitt*, 428 U.S. at 252 & n.10. A change from fact-finding by a fair and impartial judge to fact-finding by a fair and impartial jury does not implicate bedrock principles of procedure implicit in the concept of ordered liberty, nor does it necessarily affect, much less increase, the accuracy of the trial or sentencing process. Just as it failed to provide a principled basis for finding that *Apprendi* is procedural while *Ring* is substantive, the Ninth Circuit failed to articulate a meaningful rationale for treating *Ring*, but not *Apprendi*, as a watershed rule under *Teague*'s second exception.

Moreover, after this Court announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the Sixth Amendment jury-trial guarantee applies to the states through the Fourteenth Amendment, this Court determined in *DeStefano v. Woods*, 392 U.S. 631 (1968), that *Duncan* does not apply retroactively. If application of the Sixth Amendment itself is not retroactive, it would be anomalous to hold that

an incremental extension of the jury-trial guarantee is retroactive.

Furthermore, violations of "watershed" constitutional rules do not lend themselves to a harmless-error analysis because they render the proceedings unfair and inaccurate. In contrast, this Court has implied that *Ring* error is subject to a harmless error analysis. *Ring*, 536 U.S. at 609 n.7.

Finally, *Walton* placed the propriety of judicial determination of aggravating factors in capital cases squarely before this Court in 1990. No evidence has emerged since 1990 to suggest that having an impartial judge determine aggravating circumstances has created any unfairness or inaccuracy in the capital sentencing context. The State of Arizona and other states have justifiably relied on this Court's express holding in *Walton* in attempting to create capital sentencing procedures that comply with this Court's prior mandate to adequately channel the sentencer's discretion in capital cases and to increase the reliability of sentencing determinations.

To hold that the rule expressly upheld in *Walton* violates bedrock principles of procedure that implicate the fundamental fairness of the trial and sentencing proceedings would undermine principles of finality and comity. The financial and emotional costs to the parties and to victims in re-opening cases long after they have become final cannot be justified absent a showing that a new rule correcting unfairness and inaccuracy has altered our understanding of "bedrock" procedural elements essential to the conduct of a fair trial. Judicial fact-finding of aggravating circumstances was neither fundamentally unfair

nor unreliable, and this Court should reject the Ninth Circuit's holding to the contrary.

ARGUMENTS

I. THE NINTH CIRCUIT ERRED BY FINDING THAT *RING* ANNOUNCED A SUBSTANTIVE RULE.

A substantive change to a criminal statute applies retroactively to cases that have become final on direct appeal. *Bousley*, 523 U.S. at 620-21. In contrast, a new procedural rule does not apply retroactively unless it falls within one of two narrow exceptions: (1) the rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or (2) the rule requires the observance of those procedures that are "implicit in the concept of ordered liberty" and "without which[,] the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313 (plurality opinion).

The Ninth Circuit decision below conflicts with this Court's analysis of the distinction between substantive and procedural rules and with overwhelming authority holding that *Apprendi*/*Ring* effected a procedural change.

A. The *Ring* rule does not fit within this Court's definition of a substantive change for retroactivity purposes.

A new rule is substantive, for purposes of retroactive application, if it interprets "the meaning of a criminal statute created by Congress" so that conduct that formerly

resulted in criminal liability may no longer be illegal. *Bousley*, 523 U.S. at 620.

> [D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, *like decisions placing conduct "beyond the power of the criminal law-making authority to proscribe,"* [quoting *Teague*], necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal. For under our federal system it is only Congress, and not the courts, which can make conduct criminal.

Id. at 620-21 (emphasis added; citations and additional internal quotation marks omitted). The Ninth Circuit expressly recognized that "*Ring* did not decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." (Cert. Pet. App. A-44) (internal quotation marks omitted). Nevertheless, the Ninth Circuit deemed the rule substantive. This paradox undermines the majority's analysis.

In *Bousley*, this Court held that a new rule announced in *Bailey v. United States*, 516 U.S. 137 (1995), was substantive because the new interpretation limited the conduct deemed unlawful under the federal statute at issue in the *Bailey* case. 523 U.S. at 620-21. In *Bailey*, this Court interpreted "use" in a federal firearms statute to mean "active employment of the firearm," rather than "mere possession." 516 U.S. at 144. Thus, *Bailey* held in this context that certain conduct (mere possession of a firearm) is not unlawful. "[I]t would be inconsistent with the doctrinal underpinnings of habeas review" to prohibit a prisoner who did not actively employ a firearm from seeking the benefit of the substantive interpretation of the

statute. *Bousley*, 523 U.S. at 621. Habeas review "is founded on the notion that one of the 'principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Id.* at 620 (internal quotation marks omitted).

Conversely, a new procedural rule does not interpret the scope of a statute. *Id.* A procedural rule changes the way that a case is adjudicated, not what the government must prove to establish a criminal offense. *See Collins v. Youngblood*, 497 U.S. 37, 45 (1990). New procedural rules "recognize[ ] a constitutional right that typically applies to all crimes irrespective of the underlying conduct, and to all defendants irrespective of their innocence or guilt." *Coleman v. United States*, 329 F.3d 77, 84 (2d Cir. 2003). Such a rule changes an aspect of criminal proceedings, but rarely affects the "accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313 (plurality opinion). Consequently, this Court declines to apply a new procedural rule retroactively to cases on collateral review unless the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or implements a procedure "implicit in the concept of ordered liberty," without which "the likelihood of an accurate conviction is seriously diminished." *Id.* at 311, 313 (plurality opinion) (internal quotation marks omitted).

Ring did not involve an interpretation of a federal statute. Nor did it involve an interpretation of a state statute. There was nothing unclear or equivocal about any term defined in Arizona's first-degree murder statute and no risk that the defendant in *Ring* was convicted based on conduct that no longer constituted a crime. The rule that

Ring announced applies to all first-degree murder defendants irrespective of their underlying conduct or their innocence or guilt. Thus, *Ring* established a new procedural rule that does not apply retroactively unless it fits within one of the two narrow exceptions to the *Teague* bar.

B. The new rule that *Ring* announced is the same procedural rule that *Apprendi* announced, but applied to capital cases.

The ruling below conflicts with this Court's characterization of *Apprendi* as a procedural rule. In *Apprendi*, this Court considered the application of a New Jersey hate-crime statute that resulted in a sentence beyond the statutory range for the charged offense. The defendant pled guilty to possession of a firearm for an unlawful purpose, a crime that New Jersey's substantive criminal statute designated as a second-degree offense punishable under New Jersey's felony sentencing statute by a five- to ten-year prison term. 530 U.S. at 468-70. The charging document did not reference a separate New Jersey statute aimed at hate crimes that increased the maximum possible sentence by ten years upon a finding by the sentencing court – by a preponderance of the evidence – that there was a racial motive underlying the crime. *Id.* at 468-69. The New Jersey trial court made such a finding and imposed a twelve-year sentence. *Id.* at 471.

This Court found that application of New Jersey's hate-crime statute resulted in the judge making the type of finding traditionally reserved for the jury. *Id.* at 491-92. This Court held that because a finding of racial bias increased the penalty for the crime beyond the prescribed statutory maximum for the charged offense, the defendant had a Sixth Amendment right to have a jury make that

finding. *Id.* at 490, 494 n.19. This Court stated, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense" subject to the Sixth Amendment's jury-trial guarantee. *Id.* at 483 n.10.

Notwithstanding its depiction of racial motivation as an element of a greater offense that must be found by a jury beyond a reasonable doubt, this Court expressly characterized its ruling in *Apprendi* as a procedural decision: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's *procedure* is." *Id.* at 475 (emphasis added). This Court explained that New Jersey's policy behind the hate-crime sentence enhancement "has no . . . bearing on this *procedural* question[,]" that is, whether the Sixth Amendment requires a jury to determine if the defendant committed the crime motivated by hate. *Id.* (emphasis added).

Likewise, in *United States v. Gaudin*, 515 U.S. 506, 521 (1995), this Court expressly found a new rule to be procedural under analogous circumstances. In holding that the "materiality" of an allegedly false statement is an essential element of the crime of making false statements to a federal agency, this Court concluded that the question of materiality must therefore be submitted to the jury and be proven beyond a reasonable doubt. This Court nevertheless characterized the rule it created as procedural because it "does not serve as a guide to lawful behavior." *Id.*

In *Ring*, this Court determined that the logic underlying *Apprendi* applied to the determination of aggravating

circumstances in a capital case and compelled the conclusion that *Walton* should be overruled:

> [W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *See* 497 U.S. at 647-649. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury.

536 U.S. at 609 (Supreme Court Reporter citations omitted); *see also id.* at 589. Thus, *Ring* applies *Apprendi* to capital cases. If the *Apprendi* rule is procedural, then the *Ring* rule must also be procedural.

Every federal appellate court that has considered whether *Apprendi* created a substantive or a procedural rule has found it to be a procedural rule that is not entitled to retroactive application on collateral review. *See Sepulveda v. United States*, 330 F.3d 55, 62-63 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 83-88 (2d Cir. 2003); *United States v. Jenkins*, 333 F.3d 151, 154 (3d Cir. 2003); *United States v. Sanders*, 247 F.3d 139, 147-48 (4th Cir. 2001); *United States v. Brown*, 305 F.3d 304, 307-09 (5th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 842-44 (7th Cir. 2002); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002).

With the exception of the Ninth Circuit, federal appellate courts have consistently equated the *Apprendi* and *Ring* rules in resolving the substantive/procedural

question. *See Turner v. Crosby*, 339 F.3d 1247, 1284 (11th Cir. 2003); *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(dicta); *Cannon*, 297 F.3d at 944 (10th Cir. 2002). State appellate courts have similarly concluded that *Ring* merely extended the *Apprendi* rule to capital cases. *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003); *Wright v. State*, 857 So. 2d 861, 877-78 (Fla. 2003); *Leone v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *State v. Whitfield*, 107 S.W.3d 253, 257 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 469 (Nev. 2002), *cert. denied sub nom.*, *Colwell v. Nevada*, 124 S. Ct. 462 (2003); *Murphy v. State*, 54 P.3d 556, 566 (Okla. Crim. App. 2002).

C. This Court's ex post facto analysis in *Dobbert v. Florida* supports the conclusion that the *Ring* rule is procedural.

This Court's ex post facto doctrine parallels its retroactivity doctrine in an important respect: retroactive application of procedural rules does not offend the Ex Post Facto Clause, but retroactive application of substantive laws does. *Dobbert v. Florida*, 432 U.S. 282, 292 n.6 (1977). In *Dobbert*, the defendant argued that his death sentence violated the Ex Post Facto Clause. Dobbert had killed his children in 1972. At that time, Florida mandated a death sentence for capital felony convictions unless the jury, in its discretion, recommended mercy to the judge. *Id.* at 287. Before Dobbert was tried, the Florida Legislature amended the state's capital sentencing procedure to require a jury to consider aggravating and mitigating circumstances before imposing an advisory sentence. *Id.* at 289 n.5. Dobbert was sentenced under the new statute; a jury recommended life imprisonment, but the trial judge

overrode that recommendation and imposed death. *Id.* at 287.

Dobbert unsuccessfully argued to this Court that sentencing him under the new statute violated the Ex Post Facto Clause. This Court noted that ex post facto violations occur only when a statute makes criminal a previously innocent act, aggravates a crime previously committed, provides for greater punishment than the law that existed when the crime was committed, or changes the quantum of proof needed to convict a defendant. *Id.* at 292. This Court rejected Dobbert's claim, finding that the Florida statute did not fit within those descriptions; that the statutory change between the two sentencing methods was "clearly procedural;" and that "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94.

An argument for retroactive application of *Ring* is less compelling than the ex post facto argument rejected in *Dobbert*. Unlike the change at issue in *Dobbert*, the rule announced in *Ring* did not subject the defendant to a possible death sentence notwithstanding a jury recommendation of a life sentence. If the sentencing change at issue in *Dobbert* was procedural, the change announced in *Ring* can only be procedural. *See also Collins*, 497 U.S. at 51-52 (rejecting an ex post facto challenge to a new sentencing statute and finding that even though there is a "substantial" right under the Sixth Amendment to a jury trial, "it is not a right that has anything to do with the definition of crimes, defenses, or punishments").

D. The Arizona Supreme Court correctly and authoritatively concluded that *Ring* did not substantively change Arizona's first-degree murder statute or its aggravating circumstances.

Although *Ring* did not interpret the meaning of an Arizona statute, the Ninth Circuit nevertheless concluded that it announced a substantive rule. The Ninth Circuit reasoned that *Ring* redefined the substantive elements of the offense of capital murder and changed the structure of Arizona's substantive murder law, thereby creating the de facto offense of "capital murder" (for which certain aggravating factors must be proven) in addition to the offense of first-degree murder. (Cert. Pet. App. A-28 to -41.) The Ninth Circuit's reasoning does not withstand scrutiny, and its conclusion improperly disregards an authoritative Arizona Supreme Court decision to the contrary.

As an initial matter, the Ninth Circuit's reasoning would apply equally to *Apprendi*, which had the same effect on New Jersey's possession-of-a-firearm-for-an-unlawful-purpose statute that *Ring* had on Arizona's murder statute. Yet the Ninth Circuit, and virtually all other appellate courts, view the *Apprendi* rule as procedural.

More fundamentally, this Court's decision in *Ring* did *not* redefine the substantive elements of the crime of capital murder in Arizona, nor did it change the structure of Arizona's capital murder law. To the contrary, the Arizona Supreme Court held in *State v. Towery*:

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

(Cert. Pet. App. B-10.) It could not be otherwise, because a federal court decision addressing a federal question cannot change the substance of a state offense, apart from holding that, constitutionally, a state cannot prohibit certain conduct (as addressed in the first *Teague* exception).

Because the Arizona Supreme Court had already rejected the proposition that *Ring* altered the substance of Arizona law before the Ninth Circuit issued the decision below, the Ninth Circuit was not free to disagree with *Towery*. "[A] state's highest court is the final judicial arbiter of the meaning of state statutes," and its reasonable interpretation of such statutes is "deemed conclusive." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Moreover, this Court stated in *Ring* that "the Arizona court's construction of the State's own law is authoritative[.]" 536 U.S. at 603 (citation omitted). This deference, which the Ninth Circuit refused to accord below, is "fundamental to our system of federalism." *Fankell*, 520 U.S. at 916.

The Ninth Circuit decision misinterpreted this Court's decisions in *Apprendi* and *Ring*. This Court did not add

elements to extant state law crimes. This Court scrutinized the way that aggravating circumstances operated and found them to be "the functional equivalent of an element" for purposes of the jury trial guarantee, *Ring*, 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n.19), that must therefore "be found by a jury." *Id.* The decisions may have changed how we view the reach of the Sixth Amendment's jury-trial guarantee, but they did not change or modify Arizona's statutes. *Apprendi*, and *Ring* in turn, simply found the statutory schemes unconstitutional for failing to provide the necessary procedural safeguards. Thus, the Ninth Circuit erred by concluding that *Ring* created a new crime, and by refusing to defer to the Arizona Supreme Court's correct and authoritative holding to the contrary.

II. THE RULE ANNOUNCED IN *RING* NEITHER SERIOUSLY ENHANCES THE ACCURACY OF THE PROCEEDING NOR ALTERS OUR UNDERSTANDING OF BEDROCK PRINCIPLES OF CRIMINAL PROCEDURE.

The Ninth Circuit majority acknowledges that if *Ring* is a procedural rule, it can only apply retroactively if it satisfies *Teague*'s "watershed" exception, which has two requirements. First, infraction of the rule must "seriously diminish the likelihood" of an accurate proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotation marks omitted); *see also Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (stressing the principle subsequently adopted in *Teague* that new rules should not be applied on habeas review unless they "significantly improve the pre-existing fact-finding procedures").

Second, the new rule must also "alter our understanding of the *bedrock procedural elements*" that are essential to the fundamental fairness of a proceeding. *Tyler*, 533 U.S. at 665 (internal quotation marks omitted); *see also Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (making suggestion subsequently adopted in *Teague* that a new rule be applied on collateral review if it alters bedrock procedural understandings).

This narrow exception to the general rule of nonretroactivity is reserved for only a "small core" of watershed procedural rules that are "implicit in the concept of ordered liberty" and implicate "the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (internal quotation marks omitted); *Teague*, 489 U.S. at 311-12 (same). Circuit courts have reasoned that for a rule to be considered watershed it must correct structural error and not be susceptible to harmless error review. *E.g. Goode v. United States*, 305 F.3d 378, 385 (6th Cir. 2002) (citing cases). This Court has said that even a rule correcting structural error does not automatically qualify as a watershed rule. *Tyler*, 533 U.S. at 666-67. Thus, classifying an error as structural, or as violative of fundamental requirements of due process, "does not necessarily alter our understanding of these bedrock procedural elements." *Id.* at 666 n.7.

This Court has cited *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the prototypical example of a sweeping rule change that falls within this narrow exception. *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 170 (1997) (*Gideon* is the "paradigmatic example" of a watershed rule); *Teague*, 489 U.S. at 311-12 (plurality opinion) (noting that the rule announced

in *Gideon* recognized a right that is a "necessary condition precedent to any conviction for a serious crime"). *Gideon* dramatically changed the landscape of American criminal procedure by requiring states to provide counsel in all criminal trials involving serious offenses. Since deciding *Teague* in 1989, this Court has analyzed a multitude of new rules under its watershed exception and found *none* that fits within it. *See, e.g., Tyler*, 533 U.S. at 666 n.7 (citing cases). A year *after* deciding *Apprendi*, this Court noted that "it is unlikely that any of these watershed rules ha[s] yet to emerge." *Id.* (internal quotation marks omitted). The rule announced in *Ring* is not an emerging rule of such magnitude because it meets neither of the two requirements necessary for retroactive application under the *Teague* watershed exception.

A. Judicial determination of aggravating circumstances did not seriously diminish the accuracy of Summerlin's sentence.

The *Ring* rule does not qualify for retroactive application under *Teague*'s watershed exception because it does not significantly increase the accuracy of the sentencing determination. Neither judicial determination of aggravating circumstances nor judicial determination of the ultimate sentencing decision seriously diminishes the likelihood of an accurate sentencing result.

This Court presumes that judges are unbiased and honest. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). This Court further presumes that judges consider all relevant sentencing information before them and properly apply the law. *See Walton*, 497 U.S. at 653. Additionally, this Court has observed in the context of capital sentencing that judges may act more consistently than jurors.

Proffitt, 428 U.S. at 252; *see also Pulley v. Harris*, 465 U.S. 37, 46 (1984) (noting that more consistent sentencing decisions may result by vesting the ultimate sentencing authority in the judge).

The Arizona sentencing statute under which Summerlin was sentenced imposed stringent requirements that ensured accuracy and consistency in the capital sentencing determination. The statute employed a two-step procedure that this Court has characterized as having an "eligibility phase" and a "selection phase." *See Jones (Louis) v. United States*, 527 U.S. 373, 381 (1999); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). The eligibility phase establishes whether the defendant is eligible for the death penalty; in Arizona, a defendant became death eligible upon a finding that the State established at least one aggravating circumstance. A.R.S. § 13-703(E) (1978). In making that finding, the trial judge could only consider evidence admissible under the rules of evidence and had to make the finding beyond a reasonable doubt. *See* A.R.S. § 13-703(C) (1978); *State v. Jordan*, 614 P.2d 825, 828 (Ariz. 1980). In the selection phase, the judge determined whether to impose a death sentence by considering whether evidence of mitigation was sufficient to call for leniency. A.R.S. § 13-703(E) (1978).

This distinction between the eligibility phase and the selection phase is significant for purposes of analyzing the accuracy prong of *Teague*'s watershed exception because *Ring* addresses only the eligibility phase. *Ring*, 536 U.S. at 597 n.4. Answering a "tightly delineated" question (*id.* at 597 n.4), this Court issued a correspondingly narrow ruling in *Ring*: "[W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find *an aggravating circumstance* necessary for imposition of the

death penalty." *Id.* at 609 (emphasis added). *Ring* did not address jury sentencing, or overrule *Proffitt* or *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). *See also Ring*, 536 U.S. at 612 (Scalia, J., concurring) (noting that the Court's ruling only commands that jurors "find the existence of the *fact* that an aggravating factor existed"); *cf. Oken v. State*, 835 A.2d 1105, 1147 (Md. App. 2003) (noting that "*Ring* holds no implications for the selection phase of Maryland's sentencing process"). Thus, the only relevant question is whether having a judge, rather than a jury, determine aggravating circumstances seriously diminished the *accuracy* of that determination.

The instant case illustrates the accuracy of judicial determinations of aggravating circumstances. The fact of Summerlin's prior felony conviction involving the use or threat of violence against another person is beyond challenge; a jury had previously convicted Summerlin of aggravated assault. The State established the second aggravating circumstance (the murder was committed in an especially heinous, cruel or depraved manner) by presenting substantial evidence that Summerlin had raped and bludgeoned the victim. (Tr. 6/7/82, at 156, 161-63; Tr. 7/8/82, at 6.) The Arizona Supreme Court found the same two aggravating circumstances in its independent review of the capital sentence. (App. 69-70.) There was nothing unreliable or inaccurate about the determination that the State established not only one, but two aggravating circumstances that rendered Summerlin death-eligible.

Even assuming, arguendo, that *Ring* implicates the selection phase of the sentencing decision, Summerlin cannot establish that judicial sentencing seriously diminished the accuracy of his sentence. Accuracy is not readily measurable in the selection phase because "[t]he decision

whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding." *Parks*, 494 U.S. at 506 (Brennan, J., dissenting). "Any sentencing decision calls for the exercise of judgment." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion); *see also California v. Ramos*, 463 U.S. 992, 1008 (1983) (once the jury finds the defendant eligible for the death penalty, it is "free to consider a myriad of factors to determine whether death is the appropriate punishment"). Accordingly, reviewing courts cannot objectively assess the *accuracy* of the sentencer's moral judgment.

The facts of *Teague* are instructive in assessing the significance of jury involvement in sentencing as it relates to the "accuracy" of the sentence. In *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975), this Court held that the Sixth Amendment requires trial courts to draw the jury venire from a fair cross section of the community, and struck down a procedure that operated to exclude women from the venire panel. In *Teague*, this Court addressed whether the Sixth Amendment's fair cross section requirement extends to selection of the petit jury. 489 U.S. at 292. Because Teague's claim arose in a collateral proceeding, this Court held that he could not benefit from such a new rule unless the rule made certain conduct noncriminal or constituted a watershed change. *Id.* at 299-316. In deciding that the new rule was not a watershed change, this Court first focused on the purpose of the jury as a guard "against arbitrary abuses of power" that "interpos[ed] the commonsense judgment of the community between the State and the defendant." *Id.* at 314. The Court noted that: "[T]he fair cross section requirement '[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in

accordance with what we determined to be the requirements of the Sixth Amendment.'" *Id.* at 314-15 (quoting *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975)). Thus, this Court concluded in *Teague* that failure to fulfill this Sixth Amendment requirement "does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." 489 U.S. at 315.

The Ninth Circuit's conclusion that "the *Ring* rule enhances the accuracy of the determination of capital murder in Arizona" (Cert. Pet. App. A-45) is unsupportable. Having a fair and impartial judge, rather than a fair and impartial jury, determine whether the state has established at least one aggravating circumstance beyond a reasonable doubt does not seriously diminish the accuracy of that determination. Nor does it diminish the accuracy of any other aspect of the sentencing process. Thus, *Ring* does not qualify for retroactive application under *Teague*'s watershed exception.

B. The *Ring* decision did not alter bedrock principles of procedure.

Under *Teague*'s watershed exception, a new procedural rule must do more than improve the accuracy of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). It must also change our understanding of bedrock procedural elements *essential* to the fairness of a proceeding. *Id*; *Teague*, 489 U.S. at 311 (explaining that the exception is reserved for the rare instance in which changes in society and judicial perceptions of what can be demanded of the adjudicatory process alter this Court's understanding "of

the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction").

In *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), this Court held that *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the states through the Fourteenth Amendment, "should receive only prospective application." Although this Court decided *DeStefano* before *Teague, DeStefano* confirms – as does *Duncan* – that the core concern of the jury-trial guarantee is not fundamental fairness. "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *DeStefano*, 392 U.S. at 634. If application of the Sixth Amendment *itself* is not retroactive, application of a new Sixth Amendment rule that requires a jury to decide the existence of facts required to impose a capital sentence is similarly nonretroactive. A different result would be anomalous.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), *overruled, Solorio v. United States*, 483 U.S. 435 (1987), this Court held that when the Government charges a person in the military with a crime unconnected to military service, two important constitutional guarantees apply: (1) indictment by a grand jury and (2) trial by jury in a civilian court. *O'Callahan*, 395 U.S. at 273. In *Gosa v. Mayden*, 413 U.S. 665, 685 (1972), however, this Court held that these important constitutional guarantees do not apply retroactively. In reaching this conclusion, the Court relied on *DeStefano*'s implicit conclusion that bench trials are not "so infected by unfairness as to be null and void." 413 U.S. at 676 (plurality opinion).

Similarly, in *Daniel*, this Court held that the fair representation requirement for petit jury venires did not apply retroactively. 420 U.S. at 32. *DeStefano* "clearly controlled" that decision: "[O]ur decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment." *Id.* The Ninth Circuit did not address *DeStefano*, *Gosa*, or *Daniel* in the decision below. Its ruling does not square with those cases.

Moreover, in *Ring*, this Court explained that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." 536 U.S. at 607. This Court has similarly observed that *Apprendi* error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 634 (2002) (holding that *Apprendi* error did not rise to the level of "plain error"); *see also Johnson v. United States*, 520 U.S. 461, 470 (1997) (holding that failure to submit an element of an offense to the jury did not "'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings'" where the Government presented overwhelming evidence (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993))). Accordingly, *Ring* does not qualify for retroactive application under the narrow *Teague* exception for bedrock procedural elements essential to the fundamental fairness of a proceeding.

This Court's analysis in *Neder v. United States*, 527 U.S. 1 (1999), further supports the conclusion that *Ring* did not announce a watershed rule. In *Neder*, this Court held that error in failing to instruct the jurors on an element of the offense can be harmless and did not result

in structural error in that case because it did not necessarily render the trial fundamentally unfair or unreliable. 527 U.S. at 9. In *Ring*, this Court left to the Arizona Supreme Court to decide, in the first instance, if the judge's finding of the pecuniary gain aggravating circumstance was harmless error. 536 U.S. at 609 n.7 (citing *Neder*); *see also Mitchell v. Esparza*, 540 U.S. ___, 124 S. Ct. 7, 12 (2003) (per curiam) (holding that a state court's application of harmless error review to a *Ring* error was not objectively unreasonable).

Violations of "watershed" constitutional rules (such as the right to representation by counsel in all phases of criminal trials identified in *Gideon*) do not lend themselves to a harmless-error analysis. *See Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) ("[W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.") (citing *Gideon*). Because error in having a fair and impartial judge, rather than a jury, determine aggravating circumstances does not implicate fairness concerns and is subject to a harmless-error analysis, a finding that the new rule announced in *Ring* is a watershed rule would be inconsistent with *Ring* and *Neder*.

Every federal circuit court, including the Ninth Circuit, that has considered *Apprendi* retroactivity has concluded that *Apprendi* did not announce a watershed rule. *See Sepulveda v. United States*, 330 F.3d 55, 59-63 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 88-90 (2d Cir. 2003); *United States v. Swinton*, 333 F.3d 481, 489-91 (3d Cir. 2003); *United States v. Sanders*, 247 F.3d 139, 148-51 (4th Cir. 2001); *Brown*, 305 F.3d at 309-10;

Regalado v. United States, 334 F.3d 520, 526-27 (6th Cir. 2003); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993, 998-1001 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 669-70 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1218-19 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1255-57 & n.16 (11th Cir. 2001).

State appellate courts have also concluded that *Apprendi* did not announce a watershed rule. *People v. Bradbury*, 68 P.3d 494, 496-97 (Colo. App. 2002); *Figarola v. State*, 841 So. 2d 576, 577 (Fla. App. 2003); *People v. Gholston*, 772 N.E.2d 880, 886-88 (Ill. App. 2002); *Whisler v. State*, 36 P.3d 290, 300 (Kan. 2001); *Meemken v. State*, 662 N.W.2d 146, 149-50 (Minn. App. 2003); *Teague v. Palmateer*, 57 P.3d 176, 183-87 (Ore. App. 2002).

Similarly, appellate courts, other than the Ninth Circuit, that have considered retroactive application of *Ring* in light of *Teague* have also concluded that *Ring* is not a watershed rule. *Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003); *Towery*, (Cert. Pet. App. B-11 to -14), *cert. dismissed*, 124 S. Ct. 44 (2003); *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State v. Lotter*, 664 N.W.2d 892, 905-08 (Neb. 2003); *Colwell*, 59 P.3d at 473; *cf. Szabo v. Walls*, 313 F.3d 392, 398-99 (7th Cir. 2002) (dicta) (because of 28 U.S.C. § 2254(d)(1) and *Teague*, *Ring* does not govern on collateral attack). This Court should similarly conclude that *Ring* is not a watershed rule.

C. The decision below imposes significant societal costs and strains the judicial system without correcting any unfairness or inaccuracy.

"[T]he writ of habeas corpus has historically been regarded as an extraordinary remedy [that is] 'a bulwark against convictions that violate "fundamental fairness"'" and is reserved for persons whom society has "grievously wronged." *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982), in turn quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

> Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

Brecht, 507 U.S. at 637 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986) (internal quotation marks omitted in original)).

The decision below undermines the goal of obtaining a reliable result through a fundamentally fair process. The results of a proceeding long after the main event – the trial – will almost always be far *less* reliable. Hence, federal habeas courts weigh the state's strong interest in finality against the collateral adjudication of constitutional claims. *See Kuhlmann v. Wilson*, 477 U.S. 436, 447-48 (1986) (citing cases).

Furthermore, left uncorrected, the decision below will disrupt litigation in many other federal and state cases. It will directly affect the decisions applying *Apprendi* and *Ring*, as well as precipitate litigation in other lines of cases. For example, lower courts treat the rule in *Gaudin*, 515 U.S. at 522-23, which requires the jury to determine the "materiality" of an act of fraud under 18 U.S.C. § 1001, as a procedural rule for retroactivity purposes. *See, e.g.*, *United States v. Mandanici*, 205 F.3d 519, 527-31 (2d Cir. 2000); *United States v. Shunk*, 113 F.3d 31, 32-37 (5th Cir. 1997). This Court has held that an error based on *Gaudin* may be reviewed for harmless error and does not rise to the level of plain error. *Neder*, 527 U.S. at 8-11 (harmless error); *Johnson*, 520 U.S. at 469-70 (plain error). *Gaudin* is analytically indistinguishable from *Ring*. A decision that *Ring* applies retroactively would throw this Court's carefully crafted *Teague* analysis into a state of confusion and foster additional litigation far beyond Arizona's death row population and even beyond the many existing *Apprendi*-based claims.

Similarly, if left uncorrected, the decision below would inject uncertainty into adjudication of double jeopardy claims, because if *Ring* created an unproven, uncharged element of a greater offense, litigants will argue that the state or federal government failed to carry its burden of proof as to each element of the greater offense and cannot retry the case. This Court's decisions in *Castillo v. United States*, 530 U.S. 120 (2000) (holding that under 18 U.S.C. § 924(c)(1) what courts had previously treated as sentencing factors must be treated as elements of a separate aggravated crime), and *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999) (holding that 18 U.S.C. § 2119 created three separate distinct offenses instead of sentencing

factors for one offense), would become fodder for countless collateral attacks on this ground.

The *Teague* doctrine achieves the appropriate balance of interests in questions of retroactive application, and compels the conclusion that *Ring* does not apply retroactively. Federal courts should not penalize states for relying on "the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (plurality opinion). "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a [habeas] proceeding, new constitutional commands." *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982)).

Arizona has faithfully complied with this Court's changing constitutional requirements relating to capital punishment, amending its statutes in response to this Court's evolving capital jurisprudence. Following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), finding standardless sentencing discretion in capital cases unconstitutional, the Arizona legislature amended its capital sentencing procedure to include statutory aggravating and mitigating circumstances and to provide for judge-sentencing. 1973 Ariz. Sess. Laws. ch. 138, § 2 (1st Reg. Sess.). Following the decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Bell v. Ohio*, 438 U.S. 637 (1978), the Arizona legislature amended its sentencing procedure to allow the sentencer to consider any relevant mitigation. 1979 Ariz. Sess. Laws. ch. 144, § 1 (1st Reg. Sess.). Believing that *Proffitt* permitted judicial determination of the aggravating circumstances as well as judicial sentencing, the Arizona Supreme Court rejected capital defendants' Sixth Amendment challenges to Arizona's

sentencing scheme in this and other cases. In *Walton*, this Court agreed. Arizona should not be punished for relying on "the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (plurality opinion) (quoting Harlan, J., dissenting in *Desist*, 394 U.S. at 262-63)). The state should not be forced to marshal its evidence once again so that a new jury can substitute its moral judgment for that of the judge who heard the evidence when it was fresh more than twenty years ago.

Reopening cases such as this, many years after they become final, inflicts financial and emotional costs on the parties, the surviving victims, and the courts. The costs are unjustified when the error being corrected did not result in an unfair or inaccurate proceeding that casts real doubt on the result or changes the way our courts look at bedrock procedural elements of a fair trial. The judicial fact-finding of aggravating circumstances in this case was neither fundamentally unfair nor unreliable, and this Court should reject the Ninth Circuit's conclusion to the contrary.

CONCLUSION

Petitioner respectfully asks this Court to (1) hold that the rule announced in *Ring* does not apply retroactively to cases that are final on direct appeal because the rule is procedural and does not fall within *Teague*'s second exception for watershed rules, and (2) reverse the Ninth Circuit's decision insofar as it vacates the sentence of death.

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IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of an element of the offense of capital murder and that the Sixth Amendment therefore requires that they be found by a jury. The United States Court of Appeals for the Ninth Circuit, stating that it was applying *Ring* retroactively, granted Respondent Warren Summerlin federal habeas corpus relief and vacated his death sentence.

The question presented is whether the principles underlying *Ring* may be applied in the federal habeas corpus proceeding of an Arizona prisoner under a sentence of death whose direct appeal became final prior to this Court's ruling in *Ring*.

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STATEMENT OF THE CASE

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that, because the statutory aggravating factors that are prerequisites for imposition of the death penalty in Arizona operate as the functional equivalent of an element of the offense of capital murder, "the Sixth Amendment requires that they be found by a jury." *Id.* at 609. The question presented in this case is whether an Arizona death row prisoner, whose conviction and sentence became final on direct appeal in 1984, is entitled to relief from his unconstitutionally-imposed death sentence.

On July 12, 1982, Judge Philip Marquardt of the Maricopa County Superior Court sentenced Respondent Warren Wesley Summerlin to death for the first-degree murder of Brenna Bailey, a finance company investigator who had gone to Mr. Summerlin's home to speak to his wife about an overdue account. Petitioner's Appendix ("P.A.") at A-3; Joint Appendix ("J.A.") at 52. Judge Marquardt imposed the death sentence following a sentencing hearing in which he sat as the sole finder of fact on the existence of aggravating and mitigating circumstances.

Judge Marquardt's role as fact finder was mandated by the capital sentencing scheme that existed in Arizona from 1973 until this Court's decision in *Ring*. Prior to 1973, Arizona juries decided both guilt and sentence in first-degree murder cases. *See State v. Nielsen*, 495 P.2d 847, 850 (Ariz. 1972) ("A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, at the discretion of the jury trying the person charged therewith. . . .") (quoting former ARIZ. REV. STAT. § 13-453 (1956)). Arizona, however, substantially modified its capital sentencing scheme in 1973 in response to *Furman v. Georgia*, 408 U.S. 238 (1972). *See State*

v. Ring, 65 P.3d 915, 925 (Ariz. 2003). Specifically, the Arizona legislature enacted a new capital sentencing scheme requiring that the judge first make all findings of fact relevant to whether the defendant was eligible for a death sentence, and then determine whether death was the appropriate sentence. *See id.* (citing 1973 Ariz. Sess. Laws ch. 138, § 5). Under this scheme, a defendant convicted of first-degree murder was not eligible for a death sentence unless the judge found that the state had proven at least one statutory aggravating circumstance beyond a reasonable doubt. ARIZ. REV. STAT. § 13-703(B), (E) (West 2001). If the judge found one or more aggravating circumstances, *id.* § 13-703(F), and found no mitigating circumstances that were "sufficiently substantial to call for leniency," *id.* § 13-703(E), (G), he or she was required to sentence the defendant to death. *Id.* § 13-703(E).

As aggravating circumstances in Mr. Summerlin's case, Judge Marquardt found that Mr. Summerlin (1) had committed Brenna Bailey's murder in an especially heinous, cruel, or depraved manner; and (2) had a prior felony conviction involving the use or threatened use of violence on another person.[1] Judge Marquardt found no mitigating circumstances, and sentenced Mr. Summerlin to death.

On his direct appeal to the Arizona Supreme Court, Mr. Summerlin argued that Arizona's death penalty statute

1. Mr. Summerlin's prior felony conviction was for aggravated assault. That conviction arose from an incident in which a vehicle veered off the road, jumped the curb and struck Mr. Summerlin's wife, who was hospitalized for her injuries. At the scene, Mr. Summerlin brandished a pocket knife at the vehicle's driver, an act which led to the filing of the aggravated assault charge. Mr. Summerlin was not convicted of this offense, however, until after the proceedings at issue in this case had commenced. P.A. at A-3.

violated the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution because it denied him the right to have a jury determine the factual questions that led to the imposition of the death penalty. J.A. at 49-50. Inaccurately characterizing Mr. Summerlin's argument as a challenge to the constitutionality of a system that permitted the trial judge to "determine whether to impose the death penalty," the state supreme court rejected the argument by citing *Proffitt v. Florida*, 428 U.S. 242 (1976), and reaffirming the principle that jury *sentencing* is not constitutionally required. J.A. at 67-68.[2]

The Arizona Supreme Court affirmed Mr. Summerlin's convictions and sentences on November 21, 1983. Mr. Summerlin filed a timely motion for reconsideration, which the state supreme court denied on January 18, 1984. His convictions and sentences became final on April 17, 1984, when the time for seeking review by this Court lapsed.

Despite the Arizona Supreme Court's failure to recognize the nature and significance of his Sixth Amendment challenge to the Arizona death penalty statute, Mr. Summerlin continued to assert the claim. Describing the applicable constitutional principles in language strikingly similar to this Court's descriptions of those same principles fourteen years later in *Ring*, Mr. Summerlin argued in state post-conviction proceedings in

2. *Proffitt* confirmed that Florida's death penalty scheme satisfied the requirements of the *Eighth* Amendment as construed in *Furman*. *Proffitt*, 428 U.S. at 251 ("On their face these procedures [used in Florida to administer the death penalty] appear to meet the constitutional deficiencies identified in *Furman*."). In contrast, Mr. Summerlin's argument to the Arizona Supreme Court expressly indicated his reliance on "the right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution." J.A. at 49.

1988 that Arizona's capital sentencing scheme created two "subclasses of first degree murder: capital murder and non-capital murder," and that "aggravating circumstances are elements of the crime" of capital murder. J.A. at 73-74. Quoting from *Patterson v. New York*, 432 U.S. 197, 215 (1977), Mr. Summerlin argued that "[t]he relevant question is not how the fact is labeled but whether it is an 'ingredient of an offense[,] . . . a fact which the state deems so important that it must be either proved or presumed. . . .'" J.A. at 74. The state courts summarily denied Mr. Summerlin's post-conviction challenge to the Arizona death penalty statute. P.A. at C-3 to C-4.

In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court rejected another Arizona death row prisoner's Sixth Amendment challenge to Arizona's capital sentencing statute. Crucial to the ruling in *Walton* was this Court's belief that, in Arizona, aggravating circumstances were merely standards to guide the judge in choosing "between the alternative verdicts of death and life imprisonment," and thus were not the equivalent of an element of the offense of capital murder. *Id.* at 648 (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)); *see also Ring*, 536 U.S. at 598.

Despite *Walton*, Mr. Summerlin continued to assert his Sixth Amendment challenge to Arizona's capital sentencing scheme, raising the claim in his federal habeas corpus proceedings. J.A. at 78-81. Taking issue with this Court's description in *Walton* of the role of aggravating circumstances under Arizona law, he argued that "[t]he Arizona courts have held (by inference) that aggravating circumstances are elements of the crime [of capital murder] by requiring that they must be proved by competent evidence beyond a reasonable doubt." *Id.* at 79. Mr. Summerlin argued that the state's practice of referring to these critical facts as "aggravating circumstances"

did not change their "essential function," which was to distinguish the separate offenses of capital and non-capital first-degree murder. "Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element [of] the crime." *Id.* at 80. Citing *Walton*, however, the United States district court rejected Mr. Summerlin's claim. P.A. at C-23 to C-24.

While Mr. Summerlin's appeal from the district court's denial of his habeas corpus petition was pending in the United States Court of Appeals for the Ninth Circuit, the Arizona Supreme Court issued a decision which provided "further explication" of "the practical operation of Arizona's death penalty scheme." *State v. Ring* (*"Ring I"*), 25 P.3d 1139, 1150 (Ariz. 2001). The state court was prompted to clarify its capital sentencing statute because of its own uncertainty over the statute's constitutionality in light of *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Ring I*, 25 P.3d at 1150 ("While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*."). Particularly troubling to the state supreme court was this Court's description of Arizona's capital sentencing scheme in its majority opinion in *Apprendi*. *Apprendi* characterized Arizona's capital sentencing statute as one "requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." 530 U.S. at 496. The Arizona Supreme Court corrected this inaccurate description of Arizona law, holding that, "[i]n Arizona, a defendant *cannot* be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *Ring I*, 25 P.3d at 1151 (emphasis added). Rather, a "death sentence becomes possible only after

the trial judge makes a factual finding that at least one aggravating factor is present." *Id.* Although the Arizona Supreme Court concluded that this Court was in error with regard to its understanding of Arizona law, it was nevertheless bound by the Supremacy Clause to conclude that *Walton* was "controlling authority" and to reject the Sixth Amendment argument presented to it in *Ring I*. *Id.* at 1152.

This Court then granted certiorari in *Ring* "to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*." *Ring*, 536 U.S. at 596. Relying on the Arizona Supreme Court's explanation of its capital sentencing statute in *Ring I*, and "[r]ecognizing that the Arizona court's construction of the State's own law is authoritative," this Court held that *Walton* could not "survive the reasoning of *Apprendi*," and it therefore overruled *Walton* in relevant part. *Id.* at 595-96, 603, 609. Specifically, the Court held that "because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (citation omitted).

In response to this Court's ruling in *Ring*, the Ninth Circuit Court of Appeals ordered that Mr. Summerlin's appeal be heard *en banc* to resolve, among other things, the question of *Ring*'s retroactive application.[3] *See* J.A. at 9. In its opinion of September

3. A three-judge panel of the court of appeals had earlier reversed in part the district court's denial of Mr. Summerlin's petition for writ of habeas corpus. *See* J.A. at 8. The court had held that Mr. Summerlin was entitled to an evidentiary hearing on his claim that he was deprived of due process by Judge Marquardt's drug-related impairment. Specifically, the court concluded that the uncontroverted evidence of Judge Marquardt's addiction to marijuana, his two marijuana-related convictions, and the fact that he "determined by himself over a weekend

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2, 2003, the court of appeals held that *Ring* applies retroactively to federal habeas corpus proceedings. Specifically, it held that the rule announced in *Ring* was one of substantive criminal law, and was therefore exempt from the retroactivity analysis applied to new rules of constitutional criminal procedure pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *See* P.A. at A-32. Alternatively, the court of appeals held that, even if the rule announced in *Ring* were subjected to a *Teague* analysis, it would nevertheless be retroactive because it falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. P.A. at A-44 to A-63.

Petitioner filed a timely petition for writ of certiorari with this Court, and the Court granted the petition on December 1, 2003. *Schriro v. Summerlin*, 540 U.S. __, 124 S. Ct. 833 (2003).

SUMMARY OF ARGUMENT

In *Teague*, this Court held that, except in limited circumstances, "intervening changes in constitutional interpretation" will not apply retroactively to cases on federal

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that Summerlin should be executed," and thus might have made his sentencing decision while under the influence of drugs, necessitated a hearing on Mr. Summerlin's claim. *Summerlin v. Stewart*, 267 F.3d 926, 948-56 (9th Cir. 2001), *withdrawn by Summerlin v. Stewart*, 281 F.3d 836 (9th Cir. 2002).

Relying on *Walton*, the court had rejected Mr. Summerlin's Sixth Amendment challenge to Arizona's capital sentencing scheme. On February 11, 2002, however, it withdrew its decision in light of this Court's grant of certiorari in *Ring*. *Summerlin*, 281 F.3d at 837.

habeas corpus review. 489 U.S. at 306, 310 (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part)). Petitioner maintains that Mr. Summerlin and other similarly situated death row prisoners can not benefit from this Court's decision in *Ring* because the ruling in that case can not pass through the gateway of *Teague*. Brief for Petitioner on the Merits ("Pet'r. Br.") at 6-10. Not only is Petitioner's conclusion incorrect, but the entire premise of her argument is mistaken. This is not a *Teague* case. In fact, "this case presents no issue of retroactivity." *Fiore v. White*, 531 U.S. 225, 228 (2001); *see also Bunkley v. Florida*, 538 U.S. 835 (2003). *Teague* does not apply unless a habeas petitioner seeks the retroactive benefit of a change in a rule of *federal constitutional law*. *Ring* involved only this Court's correction of its misunderstanding in *Walton* regarding the nature and operation of Arizona's capital sentencing scheme. The Court abandoned *Walton* in *Ring* solely because its understanding of state law, not federal law, had changed. Accordingly, *Ring* initiated no new "federal constitutional interpretation" to apply retroactively.

But even if a *Teague* analysis were appropriate under these circumstances, it would not prevent applying *Ring* in the present case. *Teague* bars the application, on collateral review, only of *new* rules of federal constitutional law. *Ring* did not announce any new rule of federal constitutional law. *Ring* invoked the basic and immutable Sixth Amendment principle that a jury must find every element of an offense beyond a reasonable doubt, and it applied this long-recognized principle to its new understanding of the state law premise—clarified by the Arizona Supreme Court in *Ring I*—that Arizona's statutory aggravating circumstances are elements of the offense of capital murder. To apply an old constitutional doctrine to a newly understood state-law predicate is no different than applying an old

constitutional rule to a new set of facts—neither application creates a "new rule" for *Teague* purposes.

Moreover, even if *Ring* could be described as announcing a *new* rule of federal constitutional law, that rule would be substantive, not procedural. *Teague* does not bar the retroactive application of a rule of substantive criminal law. Petitioner argues that *Ring* announced a procedural change in the law, requiring juries rather than judges to now serve as the fact finders of aggravating circumstances in capital cases. Petitioner maintains that, because *Ring* merely altered *who* must determine whether aggravating circumstances exist in a capital case, it announced a procedural rule. Pet'r. Br. at 7. This argument, however, ignores the essential nature of the Court's *holding* and *reasoning* in *Ring* and focuses instead on one *result* of the Court's ruling. The Court held in *Ring* that, "*[b]ecause* Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment *requires* that they be found by a jury." 536 U.S. at 609 (emphasis added; citation omitted). To the extent that this holding could be considered a "new" rule, it would be one of substantive criminal law. Specifically, it would be a rule requiring that, when states use "aggravating circumstances" as the dividing line between capital and non-capital murder, they cause the aggravating circumstances to function as an element of the greater offense of capital murder. This rule concerns the *substance* of the criminal law, and not merely the procedures for its enforcement. *See id.* at 606 ("In various settings, we have interpreted the Constitution to require the addition of an element or elements to *the definition of a criminal offense* in order to narrow its scope.") (emphasis added).

Of course, it follows that, *because* aggravating circumstances function as an element of the offense of capital

murder in Arizona, the Sixth Amendment requires that they be proven to a jury beyond a reasonable doubt. This "procedural" *result*, however, is simply a consequence of the substantive *rule* of *Ring*. Because the true "rule" of *Ring* is one of substantive constitutional law, it is exempt from *Teague*'s presumption of non-retroactivity.

Finally, even if this Court were to conclude that *Ring* announced a new rule of federal constitutional procedure, Mr. Summerlin would be entitled to the retroactive application of that rule under *Teague*. Specifically, as the court of appeals found in this case, to the extent that *Ring* announces a procedural rule, that rule falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *See* P.A. at A-44 to A-63.

This Court has long acknowledged that the Constitution, like the English common law before it, recognizes juries as more accurate fact finders. The "accuracy" of jury fact-finding is heightened in capital cases because the unanimous verdict of a jury drawn from a cross-section of the community more accurately reflects the community's judgment regarding which homicide defendants should be eligible for the death penalty. Historically, juries have played this crucial role in homicide cases.

Ring similarly implicates bedrock procedural elements essential to the fairness of capital trials. If, as Petitioner maintains, *Ring* announced a new rule of criminal procedure, that rule most certainly derives from the understanding that the most basic Sixth Amendment principles require that a unanimous jury, not a single judge, convict a defendant of capital murder.

ARGUMENT

I. In *Ring*, this Court overruled *Walton* because its understanding of Arizona law, not federal law, had changed. Such a "change" in the law does not implicate *Teague*.

A. In *Walton*, the Court held that Arizona's capital sentencing scheme did not offend the Sixth Amendment. 497 U.S. at 647-49. In *Apprendi*, the Court explained that its holding in *Walton* rested upon its understanding that Arizona's death penalty sentencing procedure was one "requiring judges, after a jury verdict holding a defendant guilty of a *capital* crime, to find specific aggravating factors before imposing a sentence of death." 530 U.S. at 496 (emphasis added). More specifically, the Court expressed its understanding that Arizona's death penalty statutes did not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)). Thus, according to the Court, its reasoning in *Walton* did not conflict with its other Sixth Amendment jurisprudence. Rather, *Walton* merely applied well established Sixth Amendment principles to the specific factual scenario presented by the Arizona death penalty statutes. *Apprendi*, 530 U.S. at 496 (rejecting "the argument that the principles guiding [*Apprendi*] render invalid state capital sentencing schemes requiring judges, *after a jury verdict holding a defendant guilty of a capital crime*, to find specific aggravating factors before imposing a sentence of death") (emphasis added).

Faced with statements from this Court inaccurately describing Arizona law, the Arizona Supreme Court, in *Ring I*, provided "further explication" of "the practical operation of Arizona's death penalty scheme." 25 P.3d at 1150. The state

court explained that, "[i]n Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *Id.* at 1151. Rather, the Arizona capital sentencing statute invalidated by *Ring* permitted a judge to impose a sentence of death only after a sentencing hearing "at which the judge alone act[ed] as the finder of the necessary statutory factual *elements*." *Id.* (emphasis added).

In its subsequent decision in *Ring*, this Court, "[r]ecognizing that the Arizona court's construction of the State's own law is authoritative," overruled *Walton* "to the extent that it allow[ed] a sentencing judge, without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[4]

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4. *Ring* did not overrule the entirety of the Court's Sixth Amendment analysis in *Walton*. *Walton* states that the petitioner's argument in that case was that Arizona's capital sentencing scheme "would be constitutional only if a jury decides what aggravating *and mitigating* circumstances are present in a given case." 497 U.S. at 647 (emphasis added). As Justice Scalia noted in his concurring opinion in *Ring*,

> In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather "*every* finding of fact underlying the sentencing decision," including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment.

536 U.S. at 611 (citation omitted). Thus, *Walton* merely held that the Sixth Amendment does not require that the jury make "*every* finding of fact underlying the sentencing decision." *Id.* (emphasis added). This holding is consistent with the Court's Sixth Amendment jurisprudence—both before and after *Ring*.

Ring, 536 U.S. at 603, 609. The Court acknowledged that the factual premise underlying its decision in *Walton*—that a jury conviction of first-degree murder in Arizona automatically made the defendant eligible for a sentence of death—was incorrect. *Id.* at 603. Once the Arizona Supreme Court identified this error in the factual underpinnings of *Walton*, this Court, consistent with its Sixth Amendment jurisprudence, declared Arizona's death penalty statute unconstitutional.

This Court's decision in *Ring* did not announce a rule of federal constitutional law. To the extent that the Court held in *Ring* that *Walton* was wrongly decided, the error concerned only the Court's understanding of Arizona state law. Even if the Sixth Amendment issue presented in *Walton* had been identical to the issue presented in *Ring* (and a careful reading of *Walton* reveals that it was not), the Court still would have rejected Walton's Sixth Amendment argument in that case because the Court mistakenly believed that an Arizona jury could convict a defendant of *capital* murder. The Court reached a contrary result in *Ring* because its understanding of Arizona law, not federal constitutional law, had changed.

B. Thus, in *Ring* the Court was called upon to reconcile a recent clarification of the elemental components of a state's substantive law with established constitutional principles. The Court has held that situations like this do not implicate *Teague*, because they do not involve the retroactive application of new rules of constitutional criminal procedure. Specifically, in *Fiore v. White*, this Court explained that, when a state's highest court interprets a state criminal statute to require proof of a particular element, and that interpretation does not create new law, but merely clarifies what the law was at the time of a defendant's conviction, "no issue of retroactivity" exists. 531 U.S. at 228.

Fiore involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after Fiore's conviction became final. *See id.* at 226; *see also Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). Under the Pennsylvania Supreme Court's interpretation of the criminal statute, Fiore could not have been guilty of the crime for which he was convicted. *See Fiore*, 531 U.S. at 227-28. This Court originally granted certiorari in *Fiore* to consider "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.* at 226. However, because the Court was uncertain whether the Pennsylvania Supreme Court's decision represented a change in state law, it certified a question to the Pennsylvania Supreme Court. *Id.* at 228. The certified question asked whether the state court's interpretation of the statute in *Scarpone* "'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.'" *Id.* The Pennsylvania Supreme Court responded that its ruling "'merely clarified the plain language of the statute,'" and was "'the proper statement of the law at the date Fiore's conviction became final.'" *Id.* (citations omitted).

After receiving the Pennsylvania Supreme Court's confirmation that its interpretation of its state statute reflected the meaning of the statute at the time of the defendant's conviction, this Court concluded that the case "present[ed] no issue of retroactivity." *Id.* The Court then addressed the merits of Fiore's constitutional challenge to his conviction, and concluded that the conviction violated the Due Process Clause of the Fourteenth Amendment because, under the law as interpreted by the Pennsylvania Supreme Court, the state had convicted Fiore of a criminal offense without proving all of the elements of that offense beyond a reasonable doubt. *Id.* at 228-29.

Fiore closely parallels this case. In *Ring I*, the Arizona Supreme Court held that, under Arizona law, aggravating circumstances are "necessary statutory factual elements" of capital murder. 25 P.3d at 1151. Pursuant to clearly established Arizona law, the Arizona Supreme Court's interpretation of its state's death penalty statutes reflected the meaning of those statutes from the date of their enactment in 1973. *See, e.g.*, *Galloway v. Vanderpool*, 69 P.3d 23, 27 (Ariz. 2003) ("Once published, our interpretation becomes part of the statute."); *Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agric. Improvement and Power Dist.*, 275 P.2d 393, 402 (Ariz. 1955) (noting that "unreversed statutory construction is to be held part of the statute as if originally so written"). Thus, it is undisputed that, at the time of Mr. Summerlin's conviction, aggravating circumstances were "necessary statutory factual elements" of capital murder. As in *Fiore*, applying this authoritative construction of Arizona law to Mr. Summerlin involves "no issue of retroactivity."

Indeed, a careful examination of the "retroactivity" issue here reveals that the decision Mr. Summerlin seeks to apply to his case is not this Court's *Ring* decision, but rather the Arizona Supreme Court's ruling in *Ring I*. In that case, the Arizona Supreme Court recognized that its capital sentencing scheme appeared to be unconstitutional under this Court's Sixth Amendment jurisprudence, but concluded that under the Supremacy Clause, it was nevertheless bound by the anomaly of *Walton* to reject Ring's Sixth Amendment claim. *Ring I*, 25 P.3d at 1151. This Court's subsequent decision in *Ring* merely removed the obstacle presented by *Walton*, acknowledging that the earlier decision was premised on a faulty understanding of Arizona law. This Court's decision in *Ring*, however, is not the *sine qua non* of the relief Mr. Summerlin seeks. The Court could have as easily addressed the post-*Ring I*

vitality of *Walton* in a case brought by a petitioner on collateral relief, like Mr. Summerlin, as in one brought by a petitioner still on direct review, like Timothy Ring. In such a situation, Mr. Summerlin would have been in the same position as the petitioner in *Fiore*: a federal habeas petitioner seeking relief under an intervening state supreme court decision defining the meaning of a state criminal statute. The mere happenstance that Mr. Ring's case preceded Mr. Summerlin's case has given rise to the illusion of retroactivity when in fact it is not present. Had Mr. Summerlin's case been the first to reach this Court, *Fiore* would have negated any retroactivity concerns, as it should now. *Accord Dixon v. Miller*, 293 F.3d 74, 79 (2d Cir. 2002) (holding, under *Fiore*, that federal habeas petitioner's reliance on a recent New York state court decision presented "no issue of retroactivity").

II. *Ring* did not announce a "new" rule of federal constitutional law. Accordingly, *Teague* does not bar its retroactive application.

A. This case is unlike any of the Court's decisions applying its retroactivity doctrine in that it involves the overruling of a prior decision by this Court solely because of the belated discovery that the state-law premise of the earlier decision was incorrect. What changed from *Walton* to *Ring* was not federal constitutional law, but this Court's understanding of Arizona law, so the *Teague* principle—which concerns changes in federal law—is altogether inapposite.

Nonetheless, the *Teague* doctrine does recognize a principle that is analogous to the present case. The *Teague* cases hold that when a decision of this Court does not announce a *new rule* of constitutional law, but merely applies a pre-existing rule to a new factual situation, the *Teague* bar against collateral

retroactivity is not implicated. *E.g.*, *Teague*, 489 U.S. at 307 (discussing *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988)). That is akin to what happened in *Ring* because, under long-standing principles of federalism, state-law rules that are predicates for federal constitutional decision-making have the same status as facts. This Court accepts them as *given*, on the basis of an authoritative state-court pronouncement of them, and proceeds to apply federal constitutional rules to them in a way that produces differing results depending upon relevant differences in the underlying state-law rules. *Cf. NAACP v. Button*, 371 U.S. 415, 432 (1963); *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (acknowledging this Court's "duty to defer to a state court's construction of the scope of a local enactment"). When this happens—as it happened in *Ring*—the Court is no more making a *new federal constitutional rule* than it is when it applies a preexisting federal constitutional rule to a new set of facts, as in *Stringer v. Black*, 503 U.S. 222 (1992).

The Sixth Amendment principle applied in *Ring* is not one of recent vintage. Quoting from Justice Stevens' dissent in *Walton*, the Court acknowledged in *Ring* that, if the Sixth Amendment question presented in that case had been posed in 1791, "'the answer would have been clear' for '[b]y that time, *. . . the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.*'" 536 U.S. at 599 (quoting *Walton*, 497 U.S. at 710 (Stevens, J., dissenting)). "'Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.'" *Id.* Indeed, the jury's fact-finding power is historically and inextricably intertwined with offense elements

in homicide prosecutions, because it was the jury's ability to interpose that power between the executioner and the defendant that spawned the development of what came to be known as homicide "elements." *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 28-64 (1985).

B. Despite the Court's clear references to the historical underpinnings of its ruling in *Ring*, Petitioner nevertheless insists that *Ring* "announced" a "new rule." Pet'r. Br. at i. She provides no explanation for how this is so, however, other than to state that "*Ring* extended to the capital sentencing context this Court's holding in [*Apprendi*] that any alleged fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."[5] *Id.* at 4.

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5. The entirety of Petitioner's argument is premised on the *assumption* that *Ring* announced a new rule. Likewise, with one exception, the briefs submitted by *amici curiae* in support of Petitioner fail to address whether *Ring* announced a "new" rule, and instead merely assume that it did. The one exception is the brief of the United States government, which describes *Ring* and *Apprendi* not as new rules, but as "refinements of pre-existing principles." Brief of the United States as Amicus Curiae at 25.

According to the United States, "[b]efore *Apprendi*, the Court had made clear that the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment required a jury finding on all essential elements of an offense. Indeed, the fundamental importance of the jury trial right in criminal cases was well established." *Id.* at 25 (citations omitted). Similarly, on another occasion, the United States acknowledged that the rule applied by this Court in *Apprendi* arises from a "long line of consistent judicial decisions." *Harris v. United States*, 2002 WL 521354, *18 (Oral Argument) (March 25, 2002) (Deputy Solicitor General Michael R. Dreeben arguing on behalf of respondent United States). The United States similarly acknowledged in *Harris* that

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Petitioner wrongly equates *Ring* with *Apprendi* for retroactivity purposes, for even if *Apprendi* can be said to have announced a new rule of constitutional interpretation, it does not necessarily follow that *Ring* did so as well. To be sure, the essential constitutional principle applied in *Apprendi* and *Ring* was identical: the Sixth Amendment right to have a jury convict the defendant of every element of the offense beyond a reasonable doubt. *Apprendi* and *Ring*, however, implicated this constitutional principle in significantly different ways.

Apprendi involved New Jersey's "hate crime" statute, a sentence enhancement statute of general application. *See* 530 U.S. at 468-69; *see also* N.J. STAT. ANN. § 2C:44-3(e) (West 1999). A hate crime statute like New Jersey's is a relatively novel form of legislation that permits enhanced sentences for defendants who, in committing their crimes, are motivated by hatred for certain protected classes of persons. In *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993), this Court held that this nascent type of "penalty enhancement" does not offend the First Amendment's guarantee of freedom of expression; and in *Apprendi*, the Court emphasized that, "although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts," the "substantive basis" for such an enhancement was not an issue on which the Court had granted certiorari. 530 U.S. at 475. Rather, the issue before the Court in *Apprendi* was whether the Due Process Clause of the Fourteenth Amendment required that the factual determination of hate-based motivation be made by a jury on the basis of proof beyond a reasonable doubt. *Id.* at 468.

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"[t]he history in *Apprendi* . . . showed that it has been the rule down the centuries into the common law that the judge cannot give a higher sentence than based on the facts that the jury has determined." *Harris*, Tr. of Oral Arg., 2002 WL 521354, *11.

Thus, in *Apprendi*, the Court was called upon to apply its established due process and Sixth Amendment jurisprudence in a wholly unique and distinctly modern arena: hate crime sentence enhancements. The constitutional principles that guided the Court's analysis in *Apprendi*, however, were not at all modern, but rather "extend[ed] down centuries into the common law." *Id.* at 477. At least since *In re Winship*, 397 U.S. 358 (1970), it has been "clear beyond peradventure that . . . due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (quoting *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting)).

Accordingly, in *Apprendi*, the Court applied long-standing due process requirements to the novel situation presented by the modern innovation of penalty enhancements for hate-motivated crimes. *Apprendi* broke no new ground, however, in acknowledging the well established Sixth Amendment principle that a jury must find those facts that determine the maximum sentence the defendant can receive. As Justice Scalia observed, this is what the Sixth Amendment "has been assumed to guarantee throughout our history." *Id.* at 499 (Scalia, J., concurring); *accord id.* at 500 ("Sentence enhancements may be new creatures, but the question that they create for courts is not.") (Thomas, J., concurring); *see also Jones*, 526 U.S. at 251 n.11 ("[O]ur decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century."). To the extent that *Apprendi* announced a new rule, it was simply that modern sentence enhancement provisions—even ones like New Jersey's hate crime statute that apply to a variety of underlying crimes—are to be treated as elements of a

greater substantive offense whenever they expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.

This "new" aspect of *Apprendi*, however, is irrelevant to the issue presented in *Ring*, for as this Court has noted, by 1791 it "was unquestioned" that the jury was responsible for making the factual determinations that were necessary to subject a homicide defendant to capital punishment. *Ring*, 536 U.S. at 599. Consistent with this historic respect for the role of the jury in capital cases, this Court has never held that, absent the consent of the accused, the Constitution permits a judge, rather than a jury, to find the facts that differentiate capital murder from murder *simpliciter*. To the extent that *Walton* suggested that this constitutional imperative somehow did not apply to capital sentencing schemes enacted after *Furman*, the Court explained in both *Apprendi* and *Ring* that the holding in *Walton* was premised on the Court's misconception that in Arizona a prerequisite to a death sentence was a jury conviction for *capital* murder. *Ring* simply corrected the factual error the Court made in *Walton*, and withdrew the constitutional imprimatur that *Walton* mistakenly conferred on Arizona's death penalty scheme.[6]

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6. For similar reasons, Petitioner cannot rely on pronouncements from this Court that the "explicit overruling of an earlier holding no doubt creates a new rule" for *Teague* purposes. *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *see also Butler v. McKellar*, 494 U.S. 407, 412 (1990) ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'"). As is explained in Sections I.A and II.A, *ante*, the Court partially overruled *Walton* solely because of that decision's mischaracterization of Arizona state law. The Court in *Ring* was essentially correcting a factual error in *Walton*: its description of the state law predicate underlying its Sixth Amendment analysis. Nothing in *Ring* indicates that the Court was abandoning the

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Moreover, Mr. Summerlin's convictions were final not only before *Ring*, but before *Walton* as well. Thus, in rejecting the Sixth Amendment argument Mr. Summerlin advanced in his direct appeal, the Arizona Supreme Court could not have relied upon *Walton*. In determining the "newness" of a federal constitutional rule for *Teague* purposes, the Court looks to the law prevailing at the time the defendant's conviction became final. *E.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). As the preceding discussion demonstrates, long before Mr. Summerlin's conviction became final in 1984, Sixth Amendment jurisprudence required that a jury find the facts that make a homicide defendant eligible for the death penalty. *Accord Adamson v. Ricketts*, 865 F.2d 1011, 1027 (9th Cir. 1988) (holding that Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury determination). *Ring* did not announce a new rule of constitutional interpretation.

III. If *Ring* announced a new rule of constitutional interpretation, the rule is substantive, not procedural, and does not implicate *Teague*.

A. If this Court were to conclude that *Ring* did announce a new rule of federal constitutional law, the "rule" would be that, when a state relies on aggravating factors as the line of demarcation between those first-degree murders for which a

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legal principles it applied in *Walton*. Moreover, the petitioner in *Walton* argued that Arizona's capital sentencing scheme "would be constitutional only if a jury decides what aggravating *and mitigating* circumstances are present in a given case." 497 U.S. at 647 (emphasis added). *Walton* merely held that the Sixth Amendment does not require that the jury make "*every* finding of fact underlying the sentencing decision." *Id.* (emphasis added). The Court did not hold otherwise in *Ring*.

sentence of death is permissible and those for which it is not, the aggravating factors function as elements of the greater offense of capital murder. *Ring*, 536 U.S. at 609 ("Because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.") (internal quotations and citations omitted). Stated differently, the rule of *Ring* would be that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.). Thus, the decisive issue in *Ring* was whether, and under what circumstances, aggravating factors are an element of the offense of capital murder—an issue that is plainly substantive in nature. *Accord Apprendi*, 530 U.S. at 499 (Thomas, J., concurring) ("This case turns on the seemingly simple question of what constitutes a 'crime.'"); *Jones*, 526 U.S. at 229 ("This case turns on whether the federal carjacking statute . . . define[s] three distinct offenses or a single crime with a choice of three maximum penalties.").[7]

7. Every Justice of this Court, regardless of his or her opinion about the constitutional soundness of *Apprendi* and *Ring*, has acknowledged the substantive underpinnings of those two decisions. *See Sattazahn*, 537 U.S. at 111 (Scalia, J., joined by Rehnquist, C.J., & Thomas, J.) (noting that *Apprendi* "clarified what constitutes an 'element' of an offense for purposes of the Sixth Amendment's jury-trial guarantee," and that *Ring* "recognized the import of *Apprendi* in the context of capital-sentencing proceedings"); *id.* at 126 n.6 (Ginsburg, J., dissenting, joined by Stevens, Souter & Breyer, JJ.) (citing *Ring* for the proposition that "capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate *offenses*, not mere sentencing proceedings"); *see also Harris v. United States*, 536 U.S. 545, 567 (2002) (Kennedy, J., joined by Rehnquist, C.J., O'Connor

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"The substantive criminal law is to a large extent concerned with the definitions of various crimes." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(a) (2d ed. 2003). Likewise, the "rule" of *Ring* lies in its interpretation of the elements of a crime and its conclusion that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of the greater offense of capital murder. Another "basic premise" of substantive criminal law "is that a person who has engaged in criminal conduct may only be subjected to the legally prescribed punishment." *Id.* § 1.2(b). This basic substantive law premise is also critical to the "rule" of *Ring*, which identified for Sixth Amendment purposes the criminal offense for which death is the "legally prescribed punishment" in Arizona. Thus, if the Court announced a "new" rule of federal constitutional law in *Ring*, *Teague* would not bar the retroactive application of that rule because *Teague*'s rule of non-retroactivity applies only to new rules of constitutional criminal *procedure*.

B. Petitioner maintains, however, that *Ring* announced a rule that is exclusively procedural, and therefore subject to

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& Scalia, JJ.) ("Read together, *McMillan* [*v. Pennsylvania*, 477 U.S. 79 (1986),] and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis."); *id.* at 575 (Thomas, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) ("'[I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . the fact is also an element.'") (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)); *Apprendi*, 530 U.S. at 527 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy & Breyer, JJ.) (observing that *Apprendi* "concern[ed] the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element").

Teague's presumption of non-retroactivity. She advances four arguments in support of this claim. Upon examination, each of these arguments proves illusory.

Petitioner first argues that *Ring* is procedural because it "does not fit within this Court's definition of a substantive change for retroactivity purposes." Pet'r. Br. at 10. Other than *Bousley v. United States*, 523 U.S. 614 (1998), however, she cites no authority to indicate where this Court has ever "defined" a "substantive change for retroactivity purposes." Instead, relying exclusively on *Bousley*, Petitioner maintains that a new rule is "substantive" only if it interprets the meaning of a *federal* criminal statute, and then only if it mandates "that conduct that formerly resulted in criminal liability may no longer be illegal." *Id.* at 10-11. Petitioner's "definition" of a substantive rule merely restates the facts of *Bousley*. Although *Bousley* presents an *example* of a new substantive rule exempt from *Teague*'s presumption of non-retroactivity, it does not purport to define the universe of such rules.

To the extent that *Ring* announced any new rule, it would be that aggravating factors that render a homicide defendant eligible for the death penalty are elements of the offense of capital murder. As the Court acknowledged in *Ring*, some or all of Arizona's aggravating factors may exist solely because of the restrictions imposed by the Court's Eighth Amendment jurisprudence. 536 U.S. at 606 ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes.") (quoting *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring)). Nevertheless, if the Arizona legislature responded to the Court's Eighth Amendment cases by "adding the *element [the Court] held*

constitutionally required, surely the Sixth Amendment guarantee would apply to that element." *Id.* at 607 (emphasis added). *Ring* thus clarified what the Court's previous case law had failed to make plain: although aggravating factors may be mandated by the *Eighth* Amendment, they nevertheless function as an element under the *Sixth* Amendment. This holding is unmistakably substantive in nature and, as such, is exempt from *Teague*.

Petitioner's second argument is premised on her belief that "*Ring* announced . . . the same procedural rule that *Apprendi* announced, but applied to capital cases." Pet'r. Br. at 13. From this premise, Petitioner argues that, because this Court "expressly characterized its ruling in *Apprendi* as a procedural decision," *Ring* necessarily announced a procedural rule as well. *Id.* at 14-15. The "express characterization" to which Petitioner refers is this Court's statement in *Apprendi* that "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is." Pet'r. Br. at 14 (quoting *Apprendi*, 530 U.S. at 475). This statement, however, does not support the proposition for which Petitioner cites it. Rather, it refers to the fact that the Court in *Apprendi* had not granted certiorari to address the First Amendment constitutionality of basing an enhanced sentence on racial bias, an issue it had examined several Terms earlier in *Wisconsin v. Mitchell*, 508 U.S. 476. *See Apprendi*, 530 U.S. at 475.

Moreover, the Court in *Apprendi* did not characterize its *decision* as procedural, as Petitioner claims; it described the *question presented* in that case as procedural. *Id.* Answers to procedural questions may lie in substantive law principles. Because the procedural guarantees of the Fifth and Sixth Amendments apply only in the context of "a capital, or otherwise infamous crime," U.S. CONST. amend. V, or a "criminal case," *id.*, or a "criminal prosecution," *id.* amend. VI, the procedural

question posed in *Apprendi* was answered by determining "what constitutes a crime" in the context of the relevant New Jersey statutes. 530 U.S. at 499 (Thomas, J., concurring). Similarly, *Ring* answered the procedural question posed in that case by looking to substantive criminal law: "*Because* Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (emphasis added; citation omitted); *see generally* Ethan Isaac Jacobs, Note, *Is Ring Retroactive*?, 103 COLUM. L. REV. 1805 (2003) (concluding that *Ring* announced a new rule of substantive law and that its retroactive application to cases on collateral review is required by habeas retroactivity doctrine and the values underlying the writ).

Petitioner also suggests that *United States v. Gaudin*, 515 U.S. 506 (1995), is analogous to *Ring*. *Gaudin* held that the element of materiality in prosecutions for making material false statements in a matter within the jurisdiction of a federal agency must be submitted to a jury and found beyond a reasonable doubt. *See id.* at 522-23; *see also* 18 U.S.C. § 1001. Petitioner relies on *Gaudin* for its self-description as a "case of a procedural rule," which did "not serve as a guide to lawful behavior." *Gaudin*, 515 U.S. at 521. *Gaudin*, however, differs from *Ring* in a critical aspect. In *Gaudin*, the Court was not called upon to decide *whether* materiality was an element of the crime at issue. The government conceded that it was. *Id.* at 509. Accordingly, the sole issue in *Gaudin* was whether the Constitution permitted an element of an offense to be found by a judge, rather than a jury. This issue, of course, is one of procedure, not substance. In contrast, the issue in *Ring* was whether aggravating factors were elements. This issue is one of substance, not procedure, because discerning elements of crimes is a primary function of substantive criminal law.

Any doubt about this distinction between *Gaudin* and *Ring* is dispelled by the concurring opinion in *Gaudin*. There, the Chief Justice, joined by Justices O'Connor and Breyer, emphasized that *Gaudin* was easily decided because the government had conceded the most difficult question: whether materiality was an element of the offense. 515 U.S. at 524. The Chief Justice observed that, "[a]s with many aspects of statutory construction, determination of what elements constitute a crime is often subject to dispute," and he stressed that "[n]othing in the Court's decision stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration." *Id.* at 525. More specifically, the Chief Justice emphasized that a state legislature could, for example, reallocate burdens of proof by converting elements into sentencing factors for consideration by the sentencing court. *Id. Ring* rejected this aspect of the *Gaudin* concurrence, at least as it applied to capital sentencing procedures. In doing so, *Ring* addressed the substantive law issue that was not presented in *Gaudin*: what are the elements of a crime.

For her third argument that *Ring* is exclusively procedural, Petitioner turns to the Court's ex post facto jurisprudence. She maintains that the Court's cases in this area "parallel" its retroactivity cases because of their emphasis on substance versus procedure, and she discusses at length *Dobbert v. Florida*, 432 U.S. 282 (1977), an ex post facto case that, according to Petitioner, illustrates the procedural nature of the Sixth Amendment ruling in *Ring*. Pet'r. Br. at 16-17. The crux of Petitioner's argument is that, "[i]f the sentencing change at issue in *Dobbert* was procedural, the change announced in *Ring* can only be procedural." *Id.* at 17.

Petitioner's argument is misguided. Last Term, the Court once again observed that "the meaning of 'substance' and 'procedure' in a particular context is 'largely determined by the purposes for which the dichotomy is drawn.'" *Jinks v. Richland County, S.C.*, 538 U.S. 456, __, 123 S. Ct. 1667, 1672 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). For this reason, the Court is reluctant to apply definitions of "substance" and "procedure" outside the subject matter for which the definitions were created. *See id.* The constitutional prohibitions against ex post facto laws, *see* U.S. CONST. art I, § 9, cl. 3, *and* art. I, § 10, serve a vastly different function than the judicially created doctrine of non-retroactivity. Accordingly, the Court has never employed the "substance versus procedure" distinction of its ex post facto case law as a guide for determining the *Teague* retroactivity of one of its decisions. Petitioner's discussion of *Dobbert* is therefore irrelevant to the issue presently before the Court.

Moreover, even if the ex post facto definitions of "substance" and "procedure" were relevant to the retroactivity issue in this case, *Dobbert* would *support* the conclusion that *Ring* was a decision of substantive criminal law. The petitioner in *Dobbert* argued that changes in Florida's capital sentencing procedures violated the Ex Post Facto Clause. As *Dobbert* makes plain, those sentencing procedures could be invoked by Florida only "[u]pon conviction or adjudication of guilt of a defendant of a *capital* felony." 432 U.S. at 289 n.5 (emphasis added); *accord id.* at 290 ("After a defendant is found guilty of a *capital* felony, a separate sentencing hearing is held before the trial judge and the trial jury.") (emphasis added). In concluding that the changes to the Florida sentencing statute were "clearly procedural," and thus not violative of the Ex Post Facto Clause, the Court emphasized: "The new statute simply altered the methods employed in determining whether the death penalty

was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94. The issue in *Ring* was markedly different. There the Court held that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" *Sattazahn*, 537 U.S. at 111 (opinion of Scalia, J.). The quantum of punishment constitutionally permissible for these distinct crimes is undeniably different. *Dobbert* concerned the procedure for imposing punishment for capital murder; *Ring* concerned the definition of capital murder itself. The former may be procedural, but the latter is undoubtedly substantive.

Finally, Petitioner argues that the "rule" of *Ring* cannot be substantive because the Arizona Supreme Court has "correctly and authoritatively concluded that *Ring* did not substantively change Arizona's first-degree murder statute or its aggravating circumstances." Pet'r. Br. at 18; *see State v. Towery*, 64 P.3d 828 (Ariz. 2003) (holding *Ring* not retroactive for purposes of state post-conviction proceedings). Petitioner maintains that the Arizona Supreme Court conclusively "rejected the proposition that *Ring* altered the substance of Arizona law," and that the federal courts are not free to disagree with the state supreme court on this issue. Pet'r. Br. at 19. This argument misapprehends both the ruling in *Ring* and the nature of this Court's retroactivity analysis. More fundamentally, it confuses the Arizona Supreme Court's conclusive authority to interpret Arizona statutes with its more limited authority to interpret the meaning and effect of this Court's constitutional rulings.

Clearly, an interpretation of a state statute by the state's highest court is binding on a federal court. This Court recognized this principle in *Ring* when it deferred to the Arizona Supreme

Court's interpretation of the state's capital sentencing statute in *Ring I*. *See* 536 U.S. at 603. In *Towery*, however, the Arizona Supreme Court was not interpreting a state statute; it was interpreting *Ring*, a constitutional decision of this Court. Accordingly, its discussion of *Ring*'s effect on Arizona law is not an "authoritative holding." Pet'r. Br. at 20. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n.6 (1981) ("[A] state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant constitutional standard."). *Towery* is not binding on this or any other federal court.

Moreover, *Towery*'s perfunctory analysis of *Ring* is not compelling. For example, *Towery* concludes that *Ring Towery* must have announced a "new rule" because it overruled *Walton*. *Towery*, 64 P.3d at 832. This reasoning is flawed, as is shown above in Section II.

Towery also rejects the possibility that *Ring* was a ruling of substantive, rather than procedural, law. 64 P.3d at 832-33. Like Petitioner, however, *Towery* reaches this conclusion by taking *Apprendi*'s references to "substance" and "procedure" out of context. *See supra* Section III.B. The state court also refused to recognize the substantive law underpinnings of *Ring*, erroneously concluding that *Ring* could not be substantive because it did not "change" or "alter" either the underlying conduct the state was required to prove to obtain a death sentence or the requisite burden of proof. *Towery*, 64 P.3d at 833. Rather, according to the state court, *Ring* only altered only "who decides," and could therefore only be a procedural decision.

Towery's oversimplification of *Ring* strips this Court's opinion of its reasoning, and focuses solely on the *result* of the

Court's ruling. *Ring* held that, *because* aggravating circumstances in Arizona are the key factor for deciding death eligibility among homicide defendants, they function as elements of the greater offense of capital murder, and *because* aggravating circumstances function as elements under these circumstances, the Constitution requires, as it always has, that the jury determine whether they exist in any particular case. To the extent that *Ring* announced any *new* constitutional principle, it was that aggravating factors that make a homicide defendant eligible for a death sentence are elements of the offense of capital murder. The procedural result in *Ring* flowed directly and inexorably from this substantive ruling. The Arizona Supreme Court erred in *Towery* in identifying these procedural consequences as the *cause*, rather than the *result*, of this Court's ruling in *Ring*. If *Ring* announced a new rule, it is a rule of substantive criminal law, grounded in the federal Constitution, and its retroactive application is not precluded by *Teague*.

IV. If *Ring* announced a new rule of constitutional criminal procedure, it applies retroactively under *Teague*'s exception for rules that implicate the fundamental fairness and accuracy of criminal proceedings.

A. Even if Petitioner is correct that *Ring* represents an unprecedented shift in the Court's interpretation of the Constitution's procedural mandates, Mr. Summerlin would still be entitled to relief, because the "new rule" of *Ring* would constitute a watershed change in constitutional procedure that would fall under *Teague*'s second exception. Dissenting in *Apprendi*, Justice O'Connor predicted that what she described as the Court's new "increase in the maximum penalty" rule would "surely be remembered as a watershed change in constitutional law." 530 U.S. at 524, 525 (further noting that the "extraordinary rule" the Court "announce[d]" in *Apprendi*

had never, in the history of the Bill of Rights, been applied as a constitutional requirement). Such "watershed" procedural changes are not subject to *Teague*'s rule of non-retroactivity if they "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)). More specifically, *Teague* does not prohibit retroactive application of new procedural rules that (1) improve the accuracy of the trial, and (2) alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). As the court of appeals correctly concluded in this case, to the extent that *Ring* announced a new rule of constitutional procedural law, the rule satisfies these two requirements.

B. Jury fact-finding of aggravating factors improves the accuracy of capital murder trials. As the Court observed in *Ring*, "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established" in English common law. 536 U.S. at 599. Juries had assumed this important role in the English system of justice because they were "the best investigators of truth and the surest guardians of public justice." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379-80 (Cooley 4th ed. 1899). As a corollary, Blackstone warned that, when a "single magistrate" is given responsibility for "settling and adjusting a question of fact," "partiality and injustice have ample field to range in." *Id.* Consistent with this history, this Court has long recognized that juries are more accurate fact finders than judges. *See Sparf v. United States*, 156 U.S. 51, 65 (1895) (*quoting Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)) ("'it is presumed that juries are best judges of facts'").

The heightened reliability of jury fact-finding derives from several sources. First among these is the crucial role of group deliberation. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court unanimously held that the Sixth and Fourteenth Amendments prohibit states from impaneling fewer than six jurors in serious criminal cases. The Court concluded that allowing jury size to fall below six would "lead[] to inaccurate factfinding and incorrect application of the common sense of the community to the facts." *Id.* at 232. Citing empirical research, the Court observed that, "[a]s juries decrease in size, . . . they are less likely to have members who remember each of the important pieces of evidence or argument," and are also less likely to counteract the biases of individual jurors. *Id.* at 233. The Court emphasized that, "[b]ecause juries frequently face complex problems laden with value choices, the benefits of [group deliberation] are important and should be retained." *Id.* Nowhere are the benefits of group deliberation more important, or the problems faced more laden with value choices, than in determining facts that will make a defendant eligible for a death sentence. If a five-person jury is presumptively inaccurate in serious criminal cases, a "jury of one" is, *a fortiori*, inaccurate in a capital case.

The group deliberation and unanimous verdict of twelve jurors further enhances the accuracy of trials by shielding defendants from "the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The Framers had a "healthy suspicion" of judges, who necessarily operate as an arm of the government, and they therefore left "the function of determining criminal guilt *to themselves*, sitting as jurors." *Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part). Simply put, "absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt*." *Id.*

The specter of the "eccentric" judge was no abstraction for Mr. Summerlin. Judge Philip Marquardt, who sentenced both Mr. Summerlin and another man to death on the same day, had an extensive history of substance abuse problems, which culminated in his criminal conviction, removal from the bench, and disbarment. *See* P.A. at A-11 to A-13; *see also supra* note 3. Judge Marquardt's particular eccentricities notwithstanding, Mr. Summerlin's case also illustrates the concern that judges, by virtue of their position, grow inured to meting out the severest of punishments and do not approach the death-eligibility decision with the same gravity that a jury would. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (noting that juries serve as a check against "overconditioned" judges). Here again, the facts of Mr. Summerlin's case show that these essential Sixth Amendment concerns are no mere abstraction or historical anomaly. When questioned about yet another defendant he had sentenced to death while on the bench, Judge Marquardt was unable to recall the man's case, remarking only that "[t]hese guys have sentenced themselves." P.A. at A-52.

Mr. Summerlin's case thus demonstrates that relying on a single judge as the fact finder in a capital case presents an acute danger that personal eccentricities, individual biases, and inevitable acclimation to the capital sentencing process will diminish the accuracy of the capital murder proceeding. *See also* BLACKSTONE, *supra*, at 379 (observing that, when the administration of justice is "entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decision, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity"); *accord Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]he right of trial by jury is in perilous decline. That decline

is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed.").

The jury system fosters more accurate fact-finding for other reasons, as well. For example, as the court of appeals discussed in its opinion below, subjecting the state's evidence regarding aggravating circumstances to the crucible of a formal trial improves the accuracy of the verdict by eliminating the fact finder's exposure to inadmissible evidence (a common occurrence in the pre-*Ring* era of judicial fact-finding) and by improving the quality of the presentation of evidence for this critical aspect of the capital murder trial.[8] *See* P.A. at A-45 to A-50.

Accuracy, however, denotes more than the mere absence of error. It also signifies conformity to the truth or to a standard or model. WEBSTER'S NEW COLLEGIATE DICTIONARY 8 (1981). In this sense, a jury in a criminal case renders a more "accurate" verdict than a judge because its unanimous decision more closely reflects public opinion regarding the gravity of the defendant's failure to "conform" to societal "standards." Thus, in holding in *Ballew* that the Constitution prohibits states from impaneling fewer than six jurors in a serious criminal case, the Court noted concerns both of "inaccurate factfinding" *and* "incorrect

8. The state's formal presentation of aggravating circumstance evidence in this case was extremely abbreviated. *See* J.A. at 40-42. In lieu of admissible evidence regarding aggravating circumstances, Judge Marquardt received a presentence report prepared by a probation officer. The report contained numerous sentencing recommendations from the victim's family and friends, as well as from law enforcement officers and members of the community. P.A. at A-48. The report also contained the probation officer's personal opinion concerning the heinous nature of the crime. *Id.* at A-49 to A-50.

application of the common sense of the community to the facts" resulting from a jury of only five members. 435 U.S. at 232. Not only is the "common sense of the community" aspect of accuracy relevant to *Teague*'s second exception, it has enhanced significance in the context of a capital murder trial.[9] *See, e.g., Mackey*, 401 U.S. at 695 (Harlan, J., concurring in part and dissenting in part) ("[A] particular rule may be more or less crucial to the fairness of a case depending on its own factual setting.").

As the history of homicide law demonstrates, "[b]y finding facts so as to mitigate the harshness of the medieval law of homicide, the jury was able to bring the application of capital punishment for homicide more nearly in line with community perceptions relating to just deserts." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989). Modern juries perform a similar role when they find aggravating circumstances. For example, in the death-eligibility stage of capital cases, juries are routinely asked to determine whether a particular murder was committed in a

9. In applying "the common sense of the community to the facts" in its role as fact finder, a jury is *not* performing the same function as when, acting in the role of *sentencer*, it applies the "conscience of the community" in making its decision between death or life imprisonment. In the latter situation, the jury performs an Eighth Amendment function; in the former, it performs a Sixth Amendment function. *Compare Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (discussing the "strong interest in having the jury express the conscience of the community on the ultimate question of life or death") (citation and internal quotation marks omitted), *with Taylor v. Louisiana*, 419 U.S. at 527, 528 (stating that "selection of jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" because juries act as "instruments of public justice") (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

cruel, heinous or depraved manner. *See, e.g.*, ARIZ. REV. STAT. § 13-703(F)(6). Such determinations are "laden with value choices," *Ballew*, 435 U.S. at 233, which demonstrates why adherence to the jury-trial mandate is imperative in capital cases. Similarly, capital-case juries are frequently asked to determine whether a homicide defendant was motivated by an expectation of pecuniary gain. An accurate finding on this issue "requires subjective and complex inquiries into the defendant's state of mind before, during, and after the crime." *Adamson*, 865 F.2d at 1026. These types of determinations entail qualitative judgments, the accuracy of which is enhanced by "application of the common sense of the community." *Ballew*, 435 U.S. at 232; *accord Neder*, 527 U.S. at 36 n.2 (Scalia, J., concurring in part and dissenting in part) ("The jury has the right to apply its own logic (or illogic) to its decision to convict or acquit.").

Petitioner nevertheless maintains that any concerns about the "accuracy" of Judge Marquardt's findings in Mr. Summerlin's case are dispelled by the Arizona Supreme Court's subsequent affirmance of those findings. Pet'r. Br. at 24. This argument reflects a profound misunderstanding of the purpose of the jury-trial guarantee. *See, e.g.*, *Neder*, 527 U.S. at 33 (Scalia, J., dissenting) (noting the anomaly of permitting "the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) [to be] a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury.)"). *Bollenbach v. United States*, 326 U.S. 607 (1946), is instructive on this point. There, the Court emphasized that, in addressing a violation of a defendant's jury-trial right, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . ." *Id.* at 614. "In view of the place of importance that

trial by jury has in our Bill of Rights, . . . the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record," cannot substitute "for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Id.* at 615.

In determining whether a homicide defendant should be included among the very few who may constitutionally be condemned to die for their crimes, an "accurate" verdict can result only from the deliberative process and unanimous verdict of a jury. This jury must be drawn from a cross section of the community so that it is capable of accurately expressing the collective common sense of that community. The procedural ramifications of *Ring* advance these vital principles.

C. *Ring* similarly implicates "bedrock procedural elements essential to the fairness of the proceeding." *Sawyer*, 497 U.S. at 242. "The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id.* Moreover, as the Court emphasized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." *Id.* at 277 (citing *Sparf*, 156 U.S. at 105-06). Certainly then, if, as Petitioner maintains, *Ring* announced a new rule of constitutional procedure requiring that juries, rather than judges, find the facts that make a first-degree homicide defendant eligible for the death penalty, this shift in constitutional interpretation must derive from the "fundamental decision"

made by the Framers to establish this country's system of justice on the principle of trial by jury.

The Framers had a profound "reluctance to entrust plenary powers over the life . . . of the citizen to one judge." *Duncan*, 391 U.S. at 156. Yet, before *Ring*, that is precisely what Arizona law allowed. By prohibiting Arizona's unconstitutional practice of permitting a single judge to convict a defendant of capital murder, *Ring* signified a return to bedrock principles upon which the country's criminal justice system was built.

Relying upon *DeStefano v. Woods*, 392 U.S. 631 (1968), Petitioner nevertheless maintains that *Ring* cannot satisfy the fundamental fairness requirement of *Teague*'s second exception. In *DeStefano*, the Court declined to apply retroactively its decision in *Duncan v. Louisiana*, in which the Court held that the Sixth Amendment's jury-trial guarantee applies to the states through the Fourteenth Amendment. Petitioner maintains that, "[i]f application of the Sixth Amendment itself is not retroactive, it would be anomalous to hold that an incremental extension of the jury-trial guarantee is retroactive." Pet'r. Br. at 8-9. The Court, however, expressly rejected this very argument when it retroactively applied *Burch v. Louisiana*, 441 U.S. 130 (1979), which held that conviction by a nonunanimous six-person jury violated the Sixth and Fourteenth Amendments. *See Brown v. Louisiana*, 447 U.S. 323 (1980). *Brown* emphasized that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." 447 U.S. at 334 n.13 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966)). Rather, the Court "must determine retroactivity in each case by looking to the peculiar traits of the specific rule in question." *Id.* (internal quotations omitted). Thus, the Court's decision not to grant a new trial in every state case in which a defendant was convicted of a serious

offense without a jury does not control its decision whether to grant new sentencing hearings to the capital defendants affected by *Ring*.

Moreover, in *Teague*, the Court adopted the retroactivity analysis espoused by Justice Harlan in his opinions in *Mackey* and *Desist*. *See Teague*, 489 U.S. at 305-10. In *DeStefano*, by contrast, the Court resolved the retroactivity issue by means of the test outlined in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), which required the Court to consider the purpose of the new rule, the extent of reliance by law enforcement authorities on the old rule, and the effect retroactive application of the new rule would have on the administration of justice. *DeStefano*, 392 U.S. at 633. The *Teague* test is significantly different, especially in that the "effect on the administration of justice" is not a factor in the retroactivity determination. *Teague*, 489 U.S. at 302.

More importantly, in his dissenting opinion in *Desist*, Justice Harlan identified *DeStefano* as a decision in which the Court had "eroded" the principle that new rules affecting "'the very integrity of the fact-finding process'" are to be retroactively applied. *Desist v. United States*, 394 U.S. 244, 257 (1969) (Harlan J., dissenting) (quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965)). Thus, it is far from clear that *Duncan*'s retroactivity would have been resolved in the same fashion under the test developed by Justice Harlan and adopted by this Court in *Teague*.

D. If Petitioner is correct, and *Ring* announced a new rule of constitutional criminal procedure, then that rule merits inclusion with *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the exclusive group of decisions that alter our understanding of the bedrock procedural elements essential to a fair trial.

Certainly, *Ring*'s pedigree is as impressive as *Gideon*'s. "The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in every State to enter the Union thereafter." *Neder*, 527 U.S. at 31 (Scalia, J., dissenting) (citing Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870, 875 n.44 (1994)). "By comparison, the right to counsel . . . is a Johnny-come-lately: Defense counsel did not become a regular fixture of the criminal trial until the mid-1800's." *Id.* (citing W. BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 226 (1955)).

The history of this very case confirms the bedrock nature of the right Mr. Summerlin asserts. Over twenty years ago, Mr. Summerlin argued to the Arizona Supreme Court that his Sixth Amendment rights were violated when a judge, rather than a jury, found the facts upon which his death-eligibility was predicated. J.A. at 49-50. He continued to assert that right throughout his state and federal post-conviction proceedings. His Sixth Amendment claim was not premised on any novel theory. Rather, it rested on the "bedrock" Sixth Amendment guarantee of trial by jury. In 2002, in its decision in *Ring*, this Court clearly articulated the precise constitutional principle that Mr. Summerlin had been diligently asserting since his conviction. To permit Mr. Summerlin to be executed following an unquestionably unconstitutional sentencing proceeding because he seeks a "retroactive" application of this most basic Sixth Amendment guarantee could not possibly be consistent with the goals underlying the Great Writ.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

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DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WARREN-WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUMMARY OF ARGUMENT

This Court granted certiorari to decide two questions: (1) whether the Ninth Circuit erred in holding that the new rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), is substantive, and (2) whether the Ninth Circuit erred in holding that the rule, if procedural, falls within the watershed exception to the general rule of non-retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989).

Summerlin offers not two arguments, but four. His first two arguments attempt to avoid, rather than address, the two questions this Court accepted for review. Departing from the Ninth Circuit's reasoning, Summerlin first seeks to preserve the Ninth Circuit's judgment on the ground that this Court's decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Ring* concerned only a misinterpretation and correction of Arizona law. He then argues derivatively that *Ring* did not announce a new rule of constitutional law and therefore falls outside this Court's general rule against retroactive application. Summerlin's third and fourth arguments address the two questions on which this Court granted certiorari.

This Court should summarily reject Summerlin's first two arguments because, regardless whether *Walton* was based on a misinterpretation of Arizona law (it was not), *Walton* announced a Sixth Amendment rule applicable to every state that has a capital punishment statute. *Ring* similarly announced a Sixth Amendment rule applicable nationwide, and that ruling directly overruled *Walton*. Accordingly, Summerlin's first two arguments necessarily fail.[1]

---

[1] This Court may also reject Summerlin's first argument (that *Ring* merely corrected a misinterpretation of Arizona law) as waived because he did not make it in opposing the petition for writ of certiorari, and he made the argument only tangentially below (Summerlin's Ninth Circuit Brief, filed 11/12/2002, at 7). *See Baldwin v. Reese*, 541 U.S. ___, 124 S. Ct. 1347, 1352 (2004) ("Under this court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'") (quoting

(Continued on following page)

Although addressing the issues accepted for review, Summerlin's third and fourth arguments are unpersuasive. The *Ring* rule is procedural because it did not reinterpret or redefine the scope of illegal conduct or circumstances that make a murder defendant eligible for a death sentence. The *Ring* rule does not qualify for retroactive application under *Teague* because it does not implicate the accuracy or fairness of capital sentencing proceedings. *Ring* did not change *what* is to be decided, but only *who* decides – a fair and impartial judge, or a fair and impartial jury.

Ring extended the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases. State and federal courts have uniformly declined to apply the *Apprendi* rule retroactively, and there is no reasoned basis for distinguishing *Apprendi* and *Ring* for purposes of the *Teague* retroactivity analysis. Because the *Apprendi*/*Ring* rule does not implicate the fundamental fairness or accuracy of sentencing proceedings, it lacks sufficient ameliorative value to justify the burdens that its retroactive application would impose on our state and federal court systems.

ARGUMENT

I. Regardless whether this Court based its decisions in *Walton*, *Apprendi*, or *Ring* on a misconception or misapplication of state law, those cases announce federal constitutional rules applicable beyond the confines of any one state.

To avoid *Teague*'s general prohibition against retroactive application of new constitutional rules, Summerlin has developed a novel argument that *Ring* is not a new constitutional rule, but rather a correction of a "misconception" in *Walton* that "in Arizona a prerequisite to a

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Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996)) (internal quotation marks omitted).

death sentence was a jury conviction for *capital* murder." (Resp't Br. at 21.) Summerlin posits that *Ring* did not overrule *Walton* for the purpose of resolving an irreconcilable conflict between the Sixth Amendment holding in that case and the reasoning of *Apprendi*, but rather to correct the Court's misinterpretation of Arizona substantive law in light of the Arizona Supreme Court's decision in *State v. Ring* (*Ring I*), 25 P.3d 1139 (Ariz. 2001).

Regardless whether this Court based its decision in *Walton* on a misinterpretation or misapplication of state law, *Walton* announced a Sixth Amendment rule applicable nationwide. Regardless whether *Ring* interpreted or reinterpreted state law, *Ring* similarly announced a Sixth Amendment rule applicable nationwide, and that ruling directly overruled *Walton*. *See Ring*, 536 U.S. at 589, 596, 609 (the reasoning of *Apprendi* is "irreconcilable" with the *holding* of *Walton*). The only relevant inquiry is whether *Ring* announced a new constitutional rule. It undeniably did.

Furthermore, Summerlin errs in asserting that *Walton* rests on this Court's misinterpretation of Arizona law. Prior to *Walton*, this Court understood that under Arizona law, a convicted first-degree murderer was "statutorily barred" from a death sentence unless a trial court found an aggravating circumstance. *See Arizona v. Rumsey*, 467 U.S. 203, 206 (1984) (holding that the trial judge's failure to find an aggravating circumstance at the original sentencing was an acquittal of the death penalty); *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (noting that a judge must find "*some* aggravating circumstance before the death penalty may be imposed"); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (decided the same day as *Walton* and noting that aggravating circumstances make a defendant "eligible" for the death penalty).

In *Walton*, the petitioner unsuccessfully argued that Arizona's aggravating circumstances were "elements of the offense" and, as such, had to be determined by a jury. 497 U.S. at 648. The *Walton* majority and the dissent disagreed whether aggravating circumstances should be treated as elements or sentencing factors. *Compare*

Walton, 497 U.S. at 647-49, *with* 497 U.S. at 709 (Stevens, J., dissenting). Neither the majority nor the dissent, however, misunderstood the fact that an Arizona court could not issue a death sentence on the basis of a first-degree murder verdict alone. *Walton* characterized the determination of aggravating circumstances as "prerequisite to imposition of [a death] sentence," and "the specific findings *authorizing* the imposition" of a death sentence. *Id.* at 647-48 (emphasis added). *See also id.* at 645 (noting that "a jury convicted Walton of *first degree murder*," and "[t]he trial judge *then* conducted the separate sentencing hearing required by [A.R.S.] § 13-703(B)") (emphasis added).

This Court's understanding of Arizona law mirrored that of the Arizona Supreme Court at the time. *See, e.g.*, *State v. Smith*, 665 P.2d 995, 1000 (Ariz. 1983) ("While the trial court made various findings of fact pursuant to [Arizona's capital sentencing] statute, including a finding that this homicide was committed for pecuniary gain, none of these findings were *elements* of the crime of which Smith stands convicted.") (emphasis added). Summerlin's argument that this Court misinterpreted Arizona law in *Walton* necessarily fails because the Arizona Supreme Court's interpretation was authoritative and identical.

In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Citing *Walton*, the majority distinguished state capital sentencing statutes that permitted judges to find specific aggravating circumstances before imposing a death sentence, based on the belief that under such statutes, "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . " *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)). The *Apprendi* dissenters rejected the distinction, arguing that absent the finding of the

aggravating circumstance, "the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Id.* at 538. In *Ring I*, 25 P.3d 1139 at ¶ 43, the Arizona Supreme Court provided a "further explication" of the "practical operation of Arizona's death penalty scheme" and agreed with the *Apprendi* dissent's description of Arizona's procedure.

Contrary to Summerlin's argument, the Arizona Supreme Court's explication in *Ring I* does not establish that this Court misunderstood Arizona's capital sentencing statute in deciding *Walton*. In *Ring I*, the Arizona Supreme Court explained that under Arizona law, "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings," and "the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." 25 P.3d 1139, ¶ 42. The Arizona Supreme Court's statement did not refute, or even address, any statement in *Walton*. Rather, it refuted the *Apprendi* majority's statement – which would otherwise have served to distinguish *Walton* – that juries in capital cases had "found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death." *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J., dissenting)).

Apprendi created a conflict between capital and non-capital jurisprudence, and this Court resolved that conflict by recognizing in *Ring* that, under *Apprendi*'s analysis, aggravating circumstances were the "functional equivalent" of elements of an offense for purposes of the Sixth Amendment jury trial guarantee. *Ring*, 536 U.S. at 589, 596. Consequently, the jury trial guarantee now applies to the finding of aggravating circumstances: not because this Court's understanding of Arizona's statutes has changed, but because its view of what constitutes an element for Sixth Amendment purposes has changed.

II. *Ring* announced a new constitutional rule.

Summerlin contends that *Teague* "is altogether inapposite" because *Ring* did not announce a new rule of constitutional law. (Resp't Br. at 16.) The Ninth Circuit correctly rejected this contention, stating "Summerlin's argument fails because there is no doubt that *Ring* announced a new rule as that term is construed for *Teague* purposes." (Cert. Pet. App. A-43.) In fact, every other court to address this issue has concluded that *Ring* announced a new constitutional rule of criminal procedure. *See Turner v. Crosby*, 339 F.3d 1247, 1284 (11th Cir. 2003); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002); *State v. Towery*, (Cert. Pet. App. B-19, ¶ 9); *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State v. Lotter*, 664 N.W.2d 892, 904-05 (Neb. 2003); *Brown v. State*, 67 P.3d 917, 918 (Okla.Crim. App. 2003); *Bottoson v. Moore*, 833 So.2d 693, 711 (Fla. 2002) (Shaw, J., concurring).

Because *Ring* directly overruled controlling precedent, it necessarily established a new rule. *Graham v. Collins*, 506 U.S. 461, 467 (1993); *see also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (if a holding breaks new ground, was not dictated by precedent, or imposes new obligations on a government, it is a "new" rule for *Teague* purposes). Summerlin nevertheless contends that *Ring* did not announce a new rule because it merely applied a pre-existing rule to a new factual situation. He argues that *Walton* was an anomaly corrected by *Ring*, because by 1791, "'the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well-established.'" (Resp't Br. at 17.)

It is misleading to speak of "the jury's role" in finding facts that rendered a homicide defendant "eligible" for capital punishment in 1791. It superimposes an inapplicable post-*Furman*[2] concept – death eligibility based upon

[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

objective, narrowing factors – onto a legal system that knew no such paradigm. In 1791, a murder conviction resulted in a death sentence as a matter of law, without discretion to impose a lesser sentence for any reason, much less upon consideration of objective "eligibility" determinations by the judge *or* the jury. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

Summerlin also states that "this Court has never held that, absent the consent of the accused, the Constitution permits a judge, rather than a jury, to find the facts that differentiate capital murder from murder *simpliciter*." (Resp't Br. at 21.) "Capital murder" and "murder simpliciter" are not terms found in Arizona statutes. Rather, they are this Court's analytical shorthand for differentiating the defendant's status following the jury verdict in *Ring* (eligible to receive a life sentence, *i.e.*, murder simpliciter) from his status after the State proved an aggravating circumstance (eligible to receive a death sentence, *i.e.*, capital murder). Given the artificial construct of the terms "capital murder" and "murder simpliciter" as they are used in *Ring*, there is no significance to the fact that this Court has never permitted a judge to determine facts that differentiate them.

To the extent Summerlin is arguing that until *Furman* the Constitution prohibited a judge from sentencing a convicted murderer to death based on facts not heard by the jurors, he is wrong. *See Williams v. New York*, 337 U.S. 241, 242-43 (1949) (upholding capital sentence where, notwithstanding a jury recommendation of a life sentence, trial court imposed death based on trial evidence and "additional information obtained through the court's 'Probation Department and through other sources'").

When Summerlin murdered Brenna Bailey in 1981, this Court did not recognize a constitutional requirement for jury sentencing in capital cases. To the contrary, this Court had previously upheld judicial sentencing in capital cases and had noted that judicial sentencing "should lead, if anything, to even greater consistency." *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). The Arizona Supreme Court

relied on *Proffitt* in rejecting Summerlin's claim in his direct appeal. *State v. Summerlin*, 675 P.2d 686, 695 (Ariz. 1983). That reliance was not objectively unreasonable. *See O'Dell*, 521 U.S. at 156.

It was not surprising that the *Walton* Court, relying on a long line of post-*Furman* decisions in addition to *Proffitt*,[3] rejected the idea that aggravating circumstances must be proved to the jury as elements of first-degree murder before imposing a death sentence. *Walton*, 497 U.S. at 648. *Walton* was not an aberration resulting from a misinterpretation of Arizona law; it was a logical application of well-settled case law. *Ring*, in contrast, departed from that line of cases and directly overruled controlling precedent. Thus, *Ring* is a new constitutional rule.

III. *Ring* did not announce a substantive rule.

Addressing the questions presented for review, Summerlin first argues that *Ring* announced a substantive rule. His argument fails because *Ring*, like *Apprendi*, did not alter the scope of criminal conduct or aggravating circumstances that make a defendant eligible for a death sentence. As the Seventh Circuit Court of Appeals succinctly stated in rejecting the corollary *Apprendi* retroactivity argument in *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002):

> Curtis and Sax contend that *Apprendi* is substantive rather than procedural. Yet *Apprendi* is about nothing but procedure – who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt). *Apprendi* does not alter which facts have what legal significance, let alone suggest that conspiring to distribute marijuana is no longer a federal crime unless the jury finds that some particular quantity has been sold.

[3] *Spaziano v. Florida*, 468 U.S. 447 (1984); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Poland*, 476 U.S. 147; *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

Ring extended the *Apprendi* rule to capital cases, and the same reasoning applies to the question of who decides (judge versus jury) whether aggravating circumstances have been established beyond a reasonable doubt. "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 536 U.S. at 604-05. *Ring* did not alter which facts have legal significance under Arizona's substantive first-degree murder statute, ARIZ. REV. STAT. ANN. § 13-1105, or Arizona's capital sentencing statute, ARIZ. REV. STAT. ANN. § 13-703. Before and after *Ring*, the State must prove the same facts, under the same standard of proof, in order to render a defendant eligible for a death sentence. All that has changed, as most appellate courts have acknowledged, is *who* finds those facts. (*See* Pet'r Br. at 31) (citing cases holding that *Ring* announced a new procedural rule). The rule is quintessentially procedural.

Summerlin notes that *Bousley v. United States*, 523 U.S. 614 (1998), does not "define the universe" of substantive rules. (*See* Resp't Br. at 25.) *Bousley* however, illustrates the difference between substantive and procedural rules. It demonstrates that a substantive rule interprets the meaning of a statute to alter the scope of unlawful conduct. *See id.* at 620 (substantive decisions hold that a statute "does not reach certain conduct," creating the risk that a defendant "stands convicted of an act that the law does not make criminal") (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Fiore v. White, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*), fail to advance Summerlin's argument. Both *Fiore* and *Bunkley* involve a state court interpretation of the *scope of restricted conduct* under a state statute. Both cases establish that a state court interpretation that narrows the scope of a state statute so that certain conduct is not unlawful is a substantive change. Applying *Bousley*, *Fiore*, and *Bunkley* to

Ring leads to the conclusion that the *Ring* rule is procedural, rather than substantive, because *Ring* does not change what the State must prove for a defendant to be convicted of a crime or to be eligible for a death sentence. Summerlin never addresses, much less overcomes, this distinction.

Summerlin takes issue with Petitioner's argument linking retroactivity under *Apprendi* to retroactivity under *Ring*.[4] Petitioner's argument rests on this Court's statements in *Apprendi* and *Ring*, and enjoys the overwhelming weight of authority. (*See* Pet'r Br. at 15-16.) Summerlin's position rests on an unsupportable distinction between the question presented in *Apprendi* (which he concedes is procedural) and the rule announced therein (which he claims is substantive). (Resp't. Br. at 26-27.)

According to Summerlin, this Court answered the procedural question in *Apprendi* in a substantive way, by "determining what constitutes a crime" in the context of the relevant New Jersey statutes. (Resp't Br. at 26-27.) However, this Court did *not* "determine what constitutes a crime" under New Jersey law. No one disputed the interpretation, and therefore the scope of the New Jersey weapons statute or of the New Jersey enhancement statute. 530 U.S. at 468-69. Rather, this Court addressed whether the *Apprendi* defendant had a Sixth Amendment right to have a jury decide whether the State proved the facts that subjected the defendant to the greater penalty under the enhancement statute.

In *Ring*, this Court resolved the corollary procedural question with the corollary procedural rule, declaring that a capital defendant has a Sixth Amendment right to have a jury determine whether the State proved facts underlying aggravating circumstances that subjected the

[4] Summerlin suggests that while *Apprendi* announced a new rule, *Ring* did not. (Resp't Br. at 19-21.) Summerlin's amicus curiae, Criminal Defense Lawyers ("CDL"), however, argues that both *Apprendi* and *Ring* are entitled to retroactive application. (CDL Br. at 5, 10, 18.)

defendant to the greater penalty (death). If *Apprendi* announced a procedural rule, the extension of that rule to capital cases in *Ring* is necessarily procedural as well. Adopting Summerlin's conclusion that the rule in *Ring*, and derivatively the rule in *Apprendi*, is substantive would be wrong and would unsettle a multitude of cases that have held otherwise.[5]

Summerlin's criticism of Petitioner's reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), also fails. In *Gaudin*, this Court treated as procedural its holding that the trial court must submit the question of materiality to a jury. *Id.* at 521. Summerlin attempts to distinguish *Gaudin* from *Ring* because in *Gaudin*, the government conceded materiality to be an element of the offense, *id.* at 509, while in *Ring*, the State opposed the defendant's argument that aggravating circumstances were the functional equivalent of an element of the offense. *Ring*, 536 U.S. at 604. This distinction is insignificant. For purposes of the Sixth Amendment analysis, this Court in *Ring* treated aggravating circumstances as elements. *Id.* at 609.

Summerlin rejects *Dobbert v. Florida*, 432 U.S. 282 (1977), as irrelevant to the analysis of whether *Ring* announced a substantive change to Arizona's criminal code. (Pet'r. Br. at 16-17.) Summerlin asserts that the ex post facto prohibition at issue in *Dobbert* serves "a vastly different function than the judicially created doctrine of non-retroactivity." (Resp't Br. at 29.) Summerlin fails, however, to explain how those functions differ, much less

[5] Amicus CDL takes the position that this Court need not concern itself with the effects of such a decision because of other procedural obstacles that federal habeas corpus petitioners must surmount. (CDL Br. at 24.) Amicus fails to consider 18 U.S.C. § 2244(b)(2)(A), which enables habeas petitioners to surmount the retroactivity obstacle by bringing a successive petition whenever "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.*

why that difference renders this Court's pronouncements on the substantive/procedural distinction in ex post facto cases irrelevant to retroactivity cases.

Finally, Summerlin refuses to acknowledge the Arizona Supreme Court's authoritative holding in *Towery* that *Ring* "changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the State's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the State's burden to establish the factors beyond a reasonable doubt." (Cert. Pet. App. B-10, ¶ 13.) The *Towery* court considered whether "*Ring*[ ] refined the definition of an element of capital offenses, which is unquestionably a substantive decision," and concluded it did not. (*Id.* at B-9, ¶ 11.) The Arizona Supreme Court's unequivocal conclusion in *Towery* that *Ring* did *not* create a new offense of capital murder or change the definition of an element of a capital offense in Arizona is controlling. *See Martin v. Ohio*, 480 U.S. 228, 235 (1987) (the Ohio Supreme Court's holding that "unlawfulness" is not an element of the state's murder statute is an interpretation of state law that is binding on this Court).

Summerlin cites *no* case to this Court, other than the opinion below, holding that a substantive rule results whenever a court finds that a jury, rather than a judge, must determine whether a sentence-increasing fact exists. To the contrary, case law and logic support the conclusion that *Ring* announced a new procedural rule.

IV. The new rule announced in *Ring* does not significantly enhance accuracy in finding aggravating circumstances or alter bedrock principles essential to fairness.

To fall within *Teague*'s watershed exception to the general rule of non-retroactivity, a new constitutional rule of criminal procedure "must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural

elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotation marks and citations omitted).

Although Summerlin argues that the *Ring* rule fits within the watershed exception, he fails to address most of the analysis in Petitioner's opening brief or the reasoning in the supporting case law. Summerlin begins with the premise that the rule in *Ring* comes within *Teague*'s second exception because Justice O'Connor described (in dissent) the rule announced in *Apprendi* as a "watershed change." 530 U.S. at 524. Summerlin ignores, however, Justice O'Connor's express statement in her *Ring* dissent that habeas petitioners "will be barred from taking advantage of today's holding on federal collateral review." 536 U.S. at 621.

Summerlin next offers little more than a series of tangential observations by courts and commentators made in the context of addressing other constitutional issues. None of his arguments establishes that the new rule seriously enhances the accuracy of the proceeding or alters our understanding of bedrock procedural elements essential to the fairness of such proceedings.

A. Having a judge, rather than a jury, determine aggravating circumstances did not seriously diminish the accuracy of those findings.

A new rule meets the watershed criterion only if it is "so central" to an accurate determination that without it, the likelihood of obtaining an accurate result is "seriously diminished." *Teague*, 489 U.S. 288, 313 (1989) (plurality opinion). Summerlin asserts that jury fact-finding of aggravating circumstances improves the accuracy of capital murder trials. (Resp't Br. at 33). He does not, however, acknowledge that to satisfy the first part of *Teague*'s watershed exception, a new rule must *significantly* or *seriously* enhance accuracy. *See Graham v. Collins*, 506 U.S. 461, 478 (1993); *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

The *Ring* rule does not appreciably affect accuracy. That stands to reason, because this Court adopted the rule to fulfill a Sixth Amendment requirement, rather than to correct a defect in the fact-finding process. *See Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003) ("*Ring* is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context."). The jury trial right acts as a shield against an overzealous prosecutor and a compliant judge, not as a vehicle for ensuring accuracy in fact finding. *See Duncan v. Louisiana*, 391 U.S. 145, 156, 158 (1968). The primary purpose of the Sixth Amendment right is thus to "prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who . . . are less likely to function or appear as but another arm of the Government that has proceeded against him." *Baldwin v. New York*, 399 U.S. 66, 72 (1970); *see also Williams v. Florida*, 399 U.S. 78, 100 (1970) (jury's purpose is "to prevent oppression by the Government").

In *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), this Court expressly declined to retroactively apply the newly-incorporated Sixth Amendment jury trial guarantee set forth in *Duncan*. Summerlin argues, however, that this Court's retroactivity test changed after *DeStefano*, and he speculates that the *DeStefano* court might have applied *Duncan* retroactively had it applied the *Teague* test. That speculation is ill-founded because accuracy was a central retroactivity concern prior to *Teague*. *See Roberts v. Russell*, 392 U.S. 293, 294 (1968) (*per curiam*) (citing cases holding that new rules apply retroactively to correct "serious flaws" in the fact-finding process). Under this Court's pre-*Teague* jurisprudence, when a new rule raised serious questions about the accuracy of the proceeding, it was given full retroactive effect. *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977); *Williams v. United States*, 401 U.S. 646, 653 (1971) (plurality opinion). Summerlin's argument ignores the analytical overlap between the pre- and post-*Teague* retroactivity tests, and it ignores

the fact that this Court has consistently declined to give retroactive effect to newly-announced constitutional rules of criminal procedure based on the jury trial guarantee. *See, e.g., Gosa v. Mayden*, 413 U.S. 665, 676 (1972) (plurality opinion); *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975) (*per curiam*); *Allen v. Hardy*, 478 U.S. 255, 257-59 (1986) (*per curiam*).

Summerlin and his amici do not address this long, unbroken line of controlling authority, but instead focus on one pre-*Teague* case as authority for *Ring* to be applied retroactively: *Brown v. Louisiana*, 447 U.S. 323 (1980). (Resp't Br. at 40-41; CDL Br. at 3-4, 23; SCHR Br. at 15.) Their reliance on *Brown* is misplaced because *Brown* is part of this line of authority in which this Court has declined to apply retroactively the Sixth Amendment jury trial guarantee. In *Burch v. Louisiana*, 441 U.S. 130 (1979), this Court held that conviction of a nonpetty criminal offense by a non-unanimous six-person jury violated the Sixth and Fourteenth Amendments. In *Brown*, this Court applied *Burch* to a case that was pending on *direct appeal* when *Burch* was decided. *See Brown*, 447 U.S. at 337 (Justice Powell, with whom Justice Stevens joined, concurring in the judgment). *Brown* does not stand for the proposition that an incremental change to Sixth Amendment jury trial rights warrants retroactive application to cases on *collateral* review.

Although Summerlin argues that jury determination of aggravating circumstances is "more accurate," case law is to the contrary. "Although the function of the jury is to find facts, that body is not necessarily *or even probably* better at the job than the conscientious judge." *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J. concurring) (emphasis added). "[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding." *Id.* at 543 (plurality opinion); *see also Towery*, (Cert. Pet. App. B-12, ¶ 19) ("We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge."); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2003) ("[T]he likelihood of an accurate sentence was

not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence.").

With the exception of *Ballew v. Georgia*, 435 U.S. 223 (1978), all of the cases Summerlin discusses address only the jury's efficacy in shielding defendants from an oppressive government or overly zealous prosecutor, a function unrelated to fact-finding *accuracy*. Summerlin attempts, in a footnote, to distinguish between the jury's sentencing function as the "conscience of the community," which he concedes is irrelevant to accuracy, and the jury's ability to "apply the common sense of the community to the facts," which he claims increases accuracy of factfinding. (Resp't. Br. at 37, n.9). But the case he cites to draw the distinction, *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), concerns the fair cross-section requirement, and says nothing about the fact-finding process, or how jury involvement enhances accuracy. Moreover, this Court declined to apply *Taylor* retroactively. *Daniel*, 420 U.S. at 32 (citing *DeStefano*).

Summerlin's quotes from a portion of the *Ballew* opinion are from two Justices only. (Resp't Br. at 34.) The narrow holding in *Ballew* is that the Sixth Amendment jury trial guarantee requires a jury of at least six people. *Ballew* did not address whether juries were more accurate fact-finders than judges. Furthermore, although the statements Summerlin quotes from *Ballew* may be relevant to the accuracy question, they do not carry the *Ring* rule over the "seriously enhances accuracy" threshold.

Summerlin also advances the notion that juries are more accurate fact finders than judges because jurors are not exposed to inadmissible evidence. (Resp't. Br. at 36.) However, at the time of Summerlin's trial and sentencing, the admissibility evidence of aggravating circumstances was governed – as it is today – by the rules of evidence at criminal trials. *See* former ARIZ. REV. STAT. ANN. § 13-703(C) (1973). This Court presumes that judges follow the law and disregard inadmissible evidence. *Walton*, 497 U.S. at 653.

To the extent that a judge's bias, like a juror's bias, corrupts the fact-finding process, the law provides procedures for removing a biased or otherwise incompetent judge, and for reversing convictions and/or sentences in cases where such judges have presided. *See, e.g., Liteky v. United States*, 510 U.S. 540, 544 (1994); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). Thus, this Court should disregard Summerlin's irrelevant references to trial Judge Philip Marquardt's alleged marijuana use during his sentencing proceedings.[6]

Summerlin offers his unsupported observation that jury fact finding is more accurate because a jury's "unanimous decision more closely reflects public opinion regarding the gravity of the defendant's failure to 'conform' to 'societal standards.'" (Resp't Br. at 36.) However, the Constitution does not require unanimity by a 12-person jury. *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972). Moreover, public opinion is unrelated to factual accuracy.

Summerlin also offers amicus Welsh White's observation that "historically," juries "bring the application of capital punishment for homicide more nearly in line with community perceptions relating to just deserts." (Resp't Br. at 37.) Summerlin fails to recognize the distinction between jury *sentencing*, a process in which community perceptions might arguably apply, and jury determination of aggravating circumstances, which is indistinguishable from any other proof of facts in criminal trials.[7] Summerlin

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[6] Summerlin's pending habeas proceeding includes a separate claim relating to Judge Marquardt's alleged drug impairment. (Cert. Pet. App. A-16.) Contrary to the Ninth Circuit's implication in the opinion below, the State did not concede that Judge Marquardt used marijuana while deliberating. In state post-conviction proceedings, a different superior court judge, as well as the Arizona Supreme Court, rejected Summerlin's claim that Judge Marquardt's drug problems affected the conviction or sentence. Notably, Summerlin does not argue that Judge Marquardt's findings relating to the two aggravating circumstances underlying his death sentence were inaccurate.

[7] Even if the "conscience of the community" were relevant to the accuracy prong of the *Teague* analysis, and even if *Ring* implicated

(Continued on following page)

has not established that having a fair and impartial jury, rather than a fair and impartial judge, determine aggravating circumstances significantly or seriously improves accuracy in the sentencing process.

B. The *Ring* decision did not alter bedrock principles of procedure.

The second part of the *Teague* watershed exception applies to new rules that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," and implement procedures "implicit in the concept of ordered liberty." *Sawyer*, 497 U.S. at 242. In rejecting the argument that the rule announced in *Ring* implicates the watershed exception, the Arizona Supreme Court noted that "[o]ne can easily envision a system of 'ordered liberty' in which certain elements of a crime can or must be proved to a judge, not to the jury." *Towery*, (Cert. Pet. App. B-13, at ¶ 21) (quoting *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997) (holding that *Gaudin* does not apply retroactively)). Summerlin offers little to refute Petitioner's argument that the *Apprendi/Ring* rule did not alter our understanding of bedrock procedural elements necessary to ensure a fair proceeding.

"The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the

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anything more than judicial finding of aggravating circumstances, jury sentencing may not provide the type of buffer between the prosecution and the accused that Summerlin presumes. In Arizona, for example, following a recent change to jury sentencing in capital cases, the percentage of cases in which the death penalty has been imposed has dramatically increased. *See* Jim Walsh, *Jurors Dish Out Death in Arizona. Sentencing Rate Up Since Judges Lost Say*, ARIZONA REPUBLIC, Nov. 12, 2003, at A1; Robert Greenberger, *Death-Penalty Law Backfires*, WALL STREET JOURNAL, Aug. 6, 2003, at A4.

finality of state convictions valid when entered." *Sawyer*, 497 U.S. at 234. The new rule at issue in *Sawyer* was "designed as an enhancement of the accuracy of capital sentencing," but it was an incremental change and thus not an "absolute prerequisite to fundamental fairness," so this Court declined to apply it retroactively. *Id.* at 244 (quoting *Teague*, 489 U.S. at 314). The rule in *Apprendi* and *Ring*, like the rule in *Sawyer*, incrementally advanced a constitutional principle, extending the Sixth Amendment jury trial guarantee by applying it to facts that functioned as elements by increasing the maximum sentencing range. This Court should similarly decline to retroactively apply the *Apprendi/Ring* rule.

Summerlin attempts to analogize the rule in *Ring* to that announced in *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). *Gideon* introduced a fundamental and sweeping change by recognizing, for the first time, the constitutional right to counsel, a change acknowledged to fit within what is now termed the *Teague* watershed exception. Incremental extensions of the *Gideon* rule, however, have not been applied retroactively. For example, in *Adams v. Illinois*, 405 U.S. 278 (1972), the petitioner unsuccessfully argued for retroactive application of the rule announced in *Coleman v. Alabama*, 399 U.S. 1 (1968), where this Court incrementally extended the *Gideon* right to counsel to the preliminary hearing stage of criminal proceedings. Summerlin must overcome not only the fact that this Court declined to apply the seminal Sixth Amendment case – *Duncan* – retroactively, but also that *Apprendi/Ring* is at most an incremental extension of *Duncan*.

Teague strikes the necessary balance between the need for finality in the criminal justice system and a defendant's interest in applying new procedural rules retroactively. Because the *Ring* rule has no appreciable effect on accuracy and does not alter our understanding of

any bedrock procedural principle, it should not apply retroactively to cases on collateral review.

CONCLUSION

Petitioner respectfully asks this Court to (1) hold that the rule announced in *Ring* does not apply to cases on collateral review, and (2) reverse the Ninth Circuit's decision insofar as it vacates Summerlin's death sentence.

Respectfully submitted,

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No. 03-526

IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
Petitioner,

vs.

WARREN WESLEY SUMMERLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is *Ring* v. *Arizona* a new rule of criminal procedure, subject to the retroactivity limit of *Teague* v. *Lane*, or is it a rule of substantive law and therefore fully retroactive under *Bousley* v. *United States*?

2. Does *Ring* qualify for the second exception to the *Teague* rule?

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IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
Petitioner,

vs.

WARREN WESLEY SUMMERLIN,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In *Ring* v. *Arizona*, 536 U. S. 584 (2002), this Court overturned the capital sentencing systems of at least five States, and possibly as many as nine. See *id.*, at 608, n. 6. It did so

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

despite those States' reliance on a precedent of this Court expressly approving the very system in question against precisely the same attack. The opinion dismissed *stare decisis* in a single paragraph, *id.*, at 608, and made no mention of the States' massive reliance interest in the precedent. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (importance of *stare decisis*, even in constitutional cases); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 855-856 (1992) (importance of reliance); *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986) (departure only "for articulable reasons").

The question now is how much damage this about-face is going to do to the cause of justice. Will the well-deserved sentences of scores of America's most vicious murderers be overturned because of a practice that had been expressly approved at the times of their trials and direct appeals and which is extremely unlikely to have made any difference in the outcome? Such a result would be contrary to the interests of victims of crime and law-abiding society that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Nearly 23 years ago, Brenna Bailey went to the home of Warren Summerlin to speak to his wife about a delinquent account. See *State* v. *Summerlin*, 675 P. 2d 686, 689 (Ariz. 1983); *Summerlin* v. *Stewart*, 341 F. 3d 1082, 1084 (CA9 2003) (en banc). Summerlin bashed in her skull, wrapped her body in a bedspread, and left her in the trunk of a car in a store parking lot. See 675 P. 2d, at 689-690, 696. There is also evidence that he raped her. See *id.*, at 690, 696.

A jury convicted Summerlin of murder. *Id.*, at 690. The trial judge found two aggravating circumstances: a prior violent felony conviction and commission of the present offense in an especially heinous, cruel, or depraved manner. *Id.*, at 696. The trial judge imposed the death penalty upon finding these aggravating circumstances and no mitigating

circumstances sufficient to call for leniency. *Ibid.* The Arizona Supreme Court unanimously affirmed after independent review of the circumstances.

Twenty years of state and federal collateral review followed. See 341 F. 3d, at 1091. Last September, the U. S. Court of Appeals for the Ninth Circuit, sitting en banc, held that this Court's decision in *Ring* v. *Arizona*, 536 U. S. 584 (2002) applied retroactively so as to require relief from the death penalty. All guilt-phase claims were rejected unanimously. *Summerlin*, F. 3d, at 1121. Judges Rawlinson, O'Scannlain, and Tallman dissented from the judgment on penalty. *Id.*, at 1125. This Court granted certiorari on December 1, 2003.

SUMMARY OF ARGUMENT

Ring v. *Arizona* is a straightforward application of *Apprendi* v. *New Jersey*, and as such it has the same character. *Apprendi* is universally agreed to be a procedural decision subject to the retroactivity limit of *Teague* v. *Lane*, and it follows that *Ring* is also. *Ring* did not change any of the substantive criteria that Arizona law prescribes for which murderers will be sentenced to death. It changed only who decides one of those criteria: whether at least one aggravating circumstance is true. This is a quintessentially procedural rule.

Ring also does not qualify for the second exception to the *Teague* rule. Previous expansions of the right to have juries rather than judges determine guilt were held nonretroactive under the much looser standard of *Stovall* v. *Denno*, because the change did not affect the reliability of the verdict. The principles of these cases necessarily require that the further expansion in *Ring* cannot qualify under the more restrictive requirements of *Teague*.

Having one or all of the elements of an offense determined by a jury rather than a judge is not essential to the fundamental

fairness of the proceeding. Such an argument is precluded by this Court's cases on juvenile proceedings and plain error.

Recent studies on deterrence provide substantial empirical support for what common sense has always told us—the death penalty will save innocent lives if it is actually enforced. Conversely, the obstruction of the death penalty through constant churning of the rules and retroactive application of the changes will diminish deterrence and cost innocent lives.

ARGUMENT

I. *Ring* is a procedural rule, not a substantive one.

Anyone who doubts whether *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) established a procedural rule or a substantive rule need look no further than *Apprendi* itself for the answer. Defining the scope of the issue before it, the *Apprendi* Court said,

> "although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts, that issue was not raised here. The *substantive* basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's *procedure* is. The strength of the state interests that are served by the hate crime legislation has no more bearing on this *procedural* question than the strength of the interests served by other provisions of the criminal code." *Id.*, at 475 (footnote omitted; emphasis added).

Procedural rule changes have, for many years, had limited retroactive effect unless they are fundamental. See Part II, *infra*. In the past, expansions of the right of jury trial were not deemed so fundamental as to mandate retroactivity on habeas, even under earlier, more expansive views of retroactivity. Hence, it is not surprising that courts have been nearly unanimous that *Apprendi* is not retroactive. "No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive

effect." *Harris* v. *United States*, 536 U. S. 545, 581 (2002) (Thomas, J., dissenting); *infra*, at 14.

The universal recognition that *Apprendi* is not retroactive, combined with the statement in *Ring* v. *Arizona*, 536 U. S. 584, 607 (2002) that "[w]e see no reason to differentiate capital crimes from all others in this regard," *i.e.*, that *Ring* is simply an application of *Apprendi*, would seem to be sufficient to resolve the question of the retroactivity of *Ring*. To get around this obvious conclusion, the Ninth Circuit majority opinion in the present case advanced the astonishing proposition that, even though *Apprendi* is unquestionably a rule of procedure, *Ring* is nonetheless a rule of substantive law. See *Summerlin* v. *Stewart*, 341 F. 3d 1082, 1101, and n. 9 (CA9 2003).[2] This assertion has no merit.

A. Substance and Procedure.

The Ninth Circuit majority opinion relies on *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) for the proposition that the distinction between substance and procedure "is not always easy to divine." *Summerlin*, 341 F. 3d, at 1099. Indeed, no one who has wrestled with the complexities of the *Erie* doctrine could deny that the classification is "*sometimes* a challenging endeavor." *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 427 (1996) (emphasis added). At other times, though, the endeavor is clear, simple, and straightforward. This case falls in the latter category.

Gasperini illustrates when the problem is difficult and, by contrast, why this case is not. That case involved a New York statute, N. Y. Civ. Prac. Law and Rules (CPLR) § 5501(c) (McKinney 1995), which established a limit on damages and

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2. Attempting to distinguish *Ring* from *Apprendi*, the opinion says in this footnote, "*Ring*, conversely, did reach the relevant substantive basis. *See* 536 U. S., at 589-90." The cited passage is the recitation of the facts and says nothing that even conceivably supports the proposition for which it is cited.

assigned the task of applying that limit to the Appellate Division. "CPLR § 5501(c), appraised under [*Erie* and its progeny], is both 'substantive' and 'procedural': 'substantive' in that § 5501(c)'s 'deviates materially' standard controls how much a plaintiff can be awarded; '*procedural*' in that § 5501(c) *assigns decisionmaking authority* to New York's Appellate Division." *Gasperini*, 518 U. S., at 426 (emphasis added). The dual nature of this statute required reference back to the *Erie* doctrine's purpose for separating substance from procedure to answer the question of how to apply this statute in a diversity case. See *id.*, at 429-431. In contrast, the single holding of *Ring* is that the Sixth Amendment requires that Arizona's enumerated aggravating factors be found by a jury. See 536 U. S., at 609; see also *id.*, at 597-598, n. 4 (no broader claim made or considered). This holding falls squarely within *Gasperini*'s description of a procedural rule: assignment of decisionmaking authority.

Although *Gasperini* comes from a different body of law, where the substantive/procedural line is not necessarily drawn in the same place, its description of what is substantive and what is procedural makes a good starting point. The substantive law is the set of rules that determine what judgment will follow from a given set of facts, putting to one side the questions of how those facts are determined and by whom.

> "The substantive criminal law . . . is mostly concerned with what act and mental state, together with what attendant circumstances and consequences, are necessary ingredients of the various crimes. Criminal procedure . . . is concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment." 1 W. LaFave, Substantive Criminal Law § 1.1(a), p. 4 (2d ed. 2003).

Bousley v. *United States*, 523 U. S. 614, 619-620 (1998) held that the limit on retroactivity established in *Teague* v. *Lane*, 489 U. S. 288 (1989) did not apply to a petitioner seeking to benefit from the rule of *Bailey* v. *United States*, 516 U. S.

137 (1995), because that rule is substantive rather than procedural.[3] *Bailey* held that "use" of a firearm for the purpose of 18 U. S. C. § 924(c)(1) requires active employment, rather than the previous broad definition. See *Bousley*, *supra*, at 616. *Bousley* quoted *Teague*'s definition of the first exception to its rule to support the proposition that applying *Teague* to a substantive rule would be "inconsistent with the doctrinal underpinnings of habeas review . . . ." See *id.*, at 620-621. If the *Bousley* Court were revolutionizing *Teague* jurisprudence, rather than restating the first exception in different terms, it would surely have devoted more than two paragraphs to the discussion. Whether the principle involved here is an exception to *Teague* or simply outside the scope of *Teague* is not material. The situation is analogous to the old debate over whether a declaration of a party opponent is an exception to the hearsay rule or not hearsay. Compare Cal. Evid. Code § 1220 (exception), with Fed. Rule Evid. 801(d)(2) (not hearsay). Either formulation gets us to the same result. The Ninth Circuit majority appears to have considered it obvious that the first exception does not apply, brushing it off in two sentences. See 341 F. 3d, at 1109. It is just as obvious that *Bousley*'s equivalent substantive/procedural distinction does not apply.

Some of the cases in this Court's modern capital punishment jurisprudence are undisputedly substantive. That is, they hold that a certain result must follow from certain facts, regardless of how or by whom those facts are determined. *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982) held that a minor accomplice swept up in the felony-murder rule could not be executed. The procedural question of who decides whether a particular defendant qualifies for that rule was not resolved by

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3. 28 U. S. C. § 2254(d), as added by the Antiterrorism and Effective Death Penalty Act of 1996, has no such limitation. See *Lockyer* v. *Andrade*, 538 U. S. 63, 155 L. Ed. 2d 144, 158, 123 S. Ct. 1166, 1175 (2003) (applying AEDPA to a substantive Eighth Amendment claim). However, this section of AEDPA does not apply to the present case. See 341 F. 3d, at 1092.

Enmund and was settled years later in *Cabana* v. *Bullock*, 474 U. S. 376, 386 (1986), overruled on other grounds, *Pope* v. *Illinois*, 481 U. S. 497, 503, n. 7 (1987). *Cabana* recognized the *Enmund* rule as a "substantive limitation" and referred to the issue of "who makes the determination" as a "form of procedure." *Ibid.* Similarly, a defendant who is mentally retarded is ineligible for capital punishment under *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002). This is " 'a substantive restriction.' " *Ibid.* (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986)).

Penry v. *Lynaugh*, 492 U. S. 302 (1989) makes clear the equivalence between substantive status and the first *Teague* exception. *Penry* was the first case to hold that a proposed rule actually qualified for a *Teague* exception, and, with the possible exception of *Bousley*, it is the only Supreme Court case ever to find a rule that qualified. The rule proposed by Penry was the categorical exemption of the retarded from execution, *i.e.*, the rule later adopted in *Atkins*. See *id.*, at 328-329. In defining its first exception, *Teague* had quoted Justice Harlan's original proposal that "a new rule will be retroactive if it places ' "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." ' " *Id.*, at 329 (quoting *Teague*, 489 U. S., at 307, in turn quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)). In defining the exception, Justice Harlan distinguished the substantive due process cases, such as *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), from procedural due process cases, with the limitation on retroactivity not applying to the substantive cases. See *Mackey*, *supra*, at 692, and n. 7.

Penry picks up on this substantive versus procedural distinction to expand the first exception beyond the literal words of Justice Harlan's definition and beyond cases which make the underlying conduct not criminal. "Justice Harlan did speak of in terms of *substantive categorical guarantees* accorded by the Constitution, *regardless of the procedures*

followed." 492 U. S., at 329 (emphasis added). Examples include cases holding "that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, *Ford* v. *Wainwright*, *supra*, at 410 (insanity), or because of the nature of their offense, *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape) (plurality opinion)." *Id.*, at 329-330. In criminal law, a substantive constitutional rule is a rule that a particular punishment cannot be imposed on a particular defendant for a particular offense *regardless* of how scrupulously fairly the facts supporting the judgment may be determined. Cf. *Washington* v. *Glucksberg*, 521 U. S. 702, 719-720 (1997). The *Bousley* rule, that *Teague* applies only to procedural rules and not substantive ones, and *Penry*'s explanation of the first exception are simply two different ways of expressing the same principle.

Whether framed under *Bousley* or *Penry*, the question is the same. Did *Ring* find that the Arizona capital sentencing system was inconsistent with the Sixth Amendment on a substantive basis or a procedural basis? That is, did *Ring* find that the sentence could not be imposed on the facts found, "regardless of the procedures followed," *Penry*, 492 U. S., at 329, or did it find that the procedures for determining the facts were wanting.

B. The Arizona Capital Sentencing System.

Constrained by the long line of cases from *Gregg* v. *Georgia*, 428 U. S. 153 (1976), to the present, the sentencing systems of the states using capital punishment all operate within the same broad outline. That outline was described in *Tuilaepa* v. *California*, 512 U. S. 967 (1994).[4] "[T]he trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) . . . ." *Id.*, at 972. That circumstance must narrow the class of murderers eligible for

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4. For a more thorough review than space permits here, see *Oken* v. *State*, 2003 Md. LEXIS 750 (Nov. 17, 2003), reh'g denied, Dec. 18, 2003.

the death penalty, *i.e.*, "it must apply only to a subclass of defendants convicted of murder." *Ibid.* The circumstance must not be too vague. See *ibid.* To perform their function, the eligibility factors must "require an answer to a question with a factual nexus to the crime or the defendant . . . ." *Id.*, at 973. For this reason, they have always resembled the elements that distinguish a higher degree of an offense from a lower degree, and some states do the required narrowing in precisely that way, by defining a higher degree of murder. See *id.*, at 972. Others have a factfinder enter a separate finding, variously named "aggravating circumstances" or "special circumstances." See *ibid.*; *id.*, at 975.

Constrained by the case law, all states follow the eligibility decision with a selection decision, "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.*, at 972. This decision is different in kind from the eligibility decision, see *id.*, at 971, and hence it has separate requirements. See *id.*, at 972. In the sentencing decision, the sentencer is not limited to factual questions but instead may consider open-ended factors. See *id.*, at 977-978. Regardless of whether the question is phrased as "weighing," determining the "appropriate" penalty, or answering "special issues," the decision is inherently discretionary. See *id.*, at 979 (even "unbridled discretion" is permitted at this stage). In contrast to the eligibility decision, which functions in all states like a higher degree of murder, whether designated as such or not, the selection decision is very much a traditional sentencing function. It does involve factfinding, since the sentencer must find whether defendant's proffered mitigating facts are true and, in some jurisdictions, may find additional aggravating facts beyond the eligibility factors. See *id.*, at 975 (California); *Jones* v. *United States*, 527 U. S. 373, 377-378 (1999) (federal). The final decision, though, inevitably involves the exercise of discretion and a "reasoned *moral* response to the defendant's background, character, and crime." *Penry* v. *Johnson*, 532 U. S. 782, 788 (2001) (internal quotation marks omitted; emphasis in original).

Considered in this context, there really was no mystery how Arizona's pre-*Ring* system worked. In its initial opinion in *Ring*, the Arizona Supreme Court quoted with approval the *Apprendi* dissent's description of the operation of the Arizona capital sentencing system. *State* v. *Ring*, 25 P. 3d 1139, 1151 (Ariz. 2001). The state court then continued:

> "In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release. A.R.S. § 13-703.A-E. It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death. A.R.S. § 13-703.B ('The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.'). And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13-703.E ('the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated'). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present. The judge makes that finding on the basis of the evidence presented at trial and any other evidence presented at the aggravation/mitigation hearing. A.R.S. § 13-703.C. If the judge finds an aggravating circumstance, he must then proceed to determine if there are any mitigating circumstances. A.R.S. § 13-703.E. If the judge finds mitigating circumstances, he must then weigh them against the aggravators and decide by 'special verdict' whether a

death sentence is appropriate. A.R.S. § 13-703.D & E." *Ibid.*

To decide which aspects of this system *Ring* disapproved, which it left standing, and the procedural or substantive status of each, the statement from *Gasperini*, quoted *supra*, at 6, provides a useful template. *Ring* left untouched the requirement that at least one aggravating factor from the statutory list be found. *Ring* did not strike down the requirement to determine if there are any mitigating circumstances. *Ring* did not strike down the requirement that the sentence be determined based on a weighing of the two sets of circumstances and a decision of whether the death penalty is appropriate. Indeed, it could not have overturned any of these requirements without a wholesale uprooting of long-established jurisprudence as outlined in *Tuilaepa*, *supra*.

These were the substantive criteria for determining who was sentenced to death in Arizona: murderers for whom at least one aggravating circumstance is true, and for whom the death penalty is appropriate after weighing those circumstances against any mitigating circumstances. Just like the criterion for "how much a plaintiff can be awarded" in *Gasperini*, 518 U. S., 426, these substantive criteria decided "how much" of a penalty a murderer would receive. Nothing in *Ring* even remotely questions the validity of these criteria. The Ninth Circuit majority's statement that "*Ring* rendered Arizona's *substantive* capital murder statute unconstitutional," 341 F. 3d, at 1101-1102 (emphasis added), is simply incorrect.

The lone flaw in the Arizona system was that "the death sentence becomes possible only after *the trial judge* makes a factual finding that at least one aggravating factor is present." The fact that the Arizona law "assigns decisionmaking authority," cf. *Gasperini*, 518 U. S., at 426, to the trial judge was the one and only problem that *Ring* found with the system. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'

Apprendi, 530 U. S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U. S., at 609.

This holding of *Ring* is no more "substantive" than the holding of *Apprendi*. Justice Scalia explained this aspect of *Ring* and *Apprendi* for the plurality in *Sattazahn* v. *Pennsylvania*, 537 U. S. 101 (2003). *Apprendi* decided that the fact used as an enhancement in that case was "an 'element' of an offense for purposes of the Sixth Amendment's jury trial guarantee . . . no matter how the State labels it . . . ." *Id.*, at 111. In other words, for Sixth Amendment purposes, Apprendi was convicted of the offense of possession of a firearm for an unlawful purpose plus bias-motivated intimidation, of which unlawful-purpose possession was a lesser included offense. See also *Apprendi*, 530 U. S., at 491-492; *id.*, at 501 (Thomas, J., concurring) ("the core crime and the aggravating facts together constitute an aggravated crime"). In exactly the same way, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances . . . .' " *Sattazahn*, *supra*, at 111. For both *Apprendi* and *Ring*, the distinguishing feature that made the fact an element of an offense for Sixth Amendment purposes was its effect of exposing the defendant to a sentence greater than the maximum the sentencer could legally impose based on the elements of the underlying offense alone. See *ibid.*; *Apprendi*, 530 U. S., at 490.

Curiously, the Ninth Circuit majority relies on this passage of *Sattazahn* and Justice Thomas's concurrence in *Apprendi* for the proposition that *Ring* is substantive, without any explanation of why the same authorities do not also render *Apprendi* substantive. See *Summerlin*, 341 F. 3d, at 1105-1106. As noted earlier, the procedural status of *Apprendi* is conclusively established. See *supra*, at 4. Despite the most vigorous effort the Ninth Circuit majority can muster, there is no escape from the logic of the simple syllogism:

Apprendi is procedural.
Ring has the same character as *Apprendi*.
Therefore, *Ring* is procedural.

II. *Ring* does not qualify for the second *Teague* exception.

A similar syllogism should be sufficient to dispose of the alternative ground of the Ninth Circuit's decision, *i.e.*, that the rule *Ring* v. *Arizona*, 536 U. S. 584 (2002) qualifies for the second exception to the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), see *Summerlin* v. *Stewart*, 341 F. 3d 1082, 1121 (CA9 2003) (en banc). The federal courts of appeals and state supreme courts are in universal agreement that *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) is not retroactive. See *People* v. *De La Paz*, 791 N. E. 2d 489, 497, and nn. 1 and 2 (Ill. 2003), cert. denied, *De La Paz* v. *Illinois*, 157 L. Ed. 2d 221, 124 S. Ct. 320 (2003) (collecting state and federal cases and disapproving contrary intermediate appellate court holding); see also *supra*, at 4-5. A more detailed look simply confirms this conclusion.

A. The Second Exception.

In contrast to the straightforward first exception, the second exception to the rule of *Teague* has been a font of litigation and confusion from the day it was announced. This is unfortunate, unnecessary, and contrary to the purpose of *Teague* itself. See *Teague*, 489 U. S., at 305 (noting disparity of treatment from conflicting decisions). In our brief in *Beard* v. *Banks*, No. 02-1603,[5] *amicus* CJLF suggests some clarifications. The simplest, though, would be to simply recognize what the Court suggested in *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001), "it

5. This brief is available on our Web site at http://www.cjlf.org/briefs/BanksMerits.pdf.

is unlikely that *any* of these watershed rules has yet to emerge." (Internal quotation marks and brackets omitted; emphasis added.) The farther we go down the road of ever-expanding rights for criminal defendants, the smaller becomes the likelihood of discovering any previously unrecognized right that is truly fundamental. The probability is asymptotically approaching zero.

The requirements of this exceedingly narrow exception are well established, if not well understood. In his original proposal for the rule that is now *Teague*, Justice Harlan suggested an exception for cases in which a person "has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (dissenting opinion). Later, Justice Harlan reconsidered, in part because he found "inherently intractable the purported distinction" on which this exception was based. *Mackey* v. *United States*, 401 U. S. 667, 695 (1971) (opinion concurring in part and dissenting in part). Instead, he proposed that retroactivity on habeas be limited to those rules that met the pre-incorporation standard of due process under *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), overruled, *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969). *Mackey*, *supra*, at 693. *Teague* adopted an even narrower view of the exception. For a new rule to be retroactive on habeas corpus, *i.e.*, to collaterally attack judgments that were correct under the law in effect when they became "final," the rule must meet *both* tests. 489 U. S., at 312. *Ring* meets neither.

B. Accuracy and Jury Trial.

The course of this Court's retroactivity jurisprudence has not been simple, to put it mildly. See *Mackey*, 401 U. S., at 676 ("as difficult to follow as the tracks made by a beast of prey in search of its intended victim"). There has, however, been one constant throughout the changes. *Every* expansion of the Sixth Amendment right to jury trial has been held nonretroactive on collateral review, regardless of the standard used. The only jury

case which this Court has applied retroactively on habeas was a due process case dealing with neutrality in jury selection.

Before *Teague*, retroactivity on habeas was governed by the three-factor test of *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). The first and most important factor was the purpose of the rule. Correction of a practice that "raises serious questions about the accuracy of guilty verdicts in past trials," *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion), was the purpose which called most strongly for retroactivity. Such a purpose would trump the other two factors. See *ibid*. Justice Marshall, agreeing in part with Justice Harlan's approach, said, "if the purpose of a new rule implicates *decisively* the basic truth-determining function of the criminal trial, then I believe the rule should be given full retroactive application . . . ." *Id*., at 666 (opinion concurring in part and dissenting in part) (emphasis added).

In essence, Justice Harlan's *Desist* proposal identified the rules which had the strongest claim to retroactivity under the *Stovall* test and limited the second exception to those rules. It follows, then, that any rule which did not qualify for retroactivity under the *Stovall* regime would also not qualify for the accuracy-enhancing prong of the second *Teague* exception.

De Stefano v. *Woods*, 392 U. S. 631 (1968) (*per curiam*) demonstrates that the application of the *Stovall* purpose test to jury trial was not even a close question. Until *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), decided a month earlier, the Sixth Amendment jury trial right had not been held to apply to the States at all, and Louisiana did not provide one unless the defendant faced death or hard labor. See *id*., at 146. After *Duncan*, the Court granted certiorari in *De Stefano* and affirmed the denial of the Sixth Amendment claim without briefing or argument. Denial of jury trial alone does not render a trial unfair. *De Stefano*, *supra*, at 633-634. "The values implemented by the right to jury trial would not *measurably* be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right

to jury trial." *Id*., at 634 (emphasis added). Not only does jury trial not "decisively" implicate reliability, to use Justice Marshall's term, the impact is not even measurable.

Although four Justices did not join the decision, not a single one expressed disagreement with the Court's application of the *Stovall* test. Justices Harlan and Stewart reiterated their disagreement with *Duncan*, see *id*., at 635, while Justices Douglas and Black reiterated their disagreement with the whole concept of nonretroactivity. See *ibid*. Given both *Duncan* and *Stovall*, no one thought the question of applying *Stovall* to *Duncan* to yield nonretroactivity was a question that even warranted briefing and argument.

The only major jury case to be given full retroactivity on habeas corpus is *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), decided between *Duncan* and *De Stefano*. However, *Witherspoon* is a due process case, not a Sixth Amendment case. See *id*., at 523. Although the opinion mentions the Sixth Amendment in passing, see *id*., at 518, a reversal on that basis could not be reconciled with the nearly contemporaneous holding in *De Stefano* that *Duncan*'s incorporation of the jury trial right in the Fourteenth Amendment, making it applicable to the States, was not retroactive. The issue in *Witherspoon* was not jury versus judge but rather the long-established due process right to a neutral trier of fact. See *id*., at 521-522.

The next major expansion of the Sixth Amendment jury trial right came in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), which constitutionalized the requirement that the jury be drawn from a cross-section of the community. See *id*., at 528; cf. *id*., at 538-540 (Rehnquist, J., dissenting) (discussing prior contrary authority). As with *Duncan*, the application of the *Stovall* test was so straightforward as to not require argument. *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) (*per curiam*) summarily affirmed a conviction obtained contrary to the new rule of *Taylor*. The cross-section requirement did not implicate the reliability of the result to a degree that would require retrial of cases which had been tried in reliance on the authorities noted

in Justice Rehnquist's dissent. See *Id.*, at 32-33. Again, there was no dissent from the conclusion that jury trial expansion did not meet *Stovall*'s criteria for nonretroactivity. Justice Douglas reiterated his dissent from *Stovall* itself. See *id.*, at 33-34 (dissenting opinion).

Burch v. *Louisiana*, 441 U. S. 130, 138 (1979), requiring six-member juries to be unanimous, was the first case to have its retroactivity decided along the lines of today's rules of *Teague* and *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). *Brown* v. *Louisiana*, 447 U. S. 323 (1980) addressed the retroactivity of *Burch* but did not produce a majority opinion. The holding is that of the opinion concurring on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). That is the opinion of Justice Powell, limiting retroactivity of *Burch* to cases then pending on direct review. *Brown*, *supra*, at 337.[6]

Although it was not decided on Sixth Amendment grounds, the treatment of *Batson* v. *Kentucky*, 476 U. S. 79 (1986) sheds light on the retroactivity of expansion of constitutional jury rules. *Batson* had the strongest claim to retroactivity of any jury case since *Witherspoon*. Its prohibition of racially biased peremptory challenges, see *id.*, at 89, was closer to *Witherspoon*'s concern with a neutral decisionmaker than to the issues of judge versus jury in *Duncan*. The exclusion of black jurors from the trial of a black defendant has far greater implications for the fairness of the trial and reliability of the result than does the exclusion of women from the trial of a man at issue in *Taylor*. See *Taylor*, 419 U. S., at 539-540 (Rehnquist, J., dissenting); *Allen* v. *Hardy*, 478 U. S. 255, 263-264 (1986) (Marshall, J., dissenting).

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6. At this point, Justice Powell had adopted the view of retroactivity previously proposed by Justice Harlan, see *Hankerson* v. *North Carolina*, 432 U. S. 233, 246-248 (1977) (Powell, J., concurring in the judgment), and subsequently adopted in *Griffith* and *Teague*.

Even so, a majority of the Court considered the retroactivity of *Batson* on habeas under the *Stovall* test to be straightforward enough to resolve, once again, in a summary *per curiam* opinion. *Batson* "may have some bearing on the truthfinding function," *Allen*, 478 U. S., at 259, but that was not enough to apply retroactively on habeas a decision overruling a Supreme Court precedent on point. It did not have "such a fundamental impact on the integrity of factfinding as to compel retroactive application." *Ibid.* *Griffith*, 479 U. S., at 326-328 applied *Batson* retroactively on direct review only by abandoning *Stovall* and adopting Justice Harlan's position of full retroactivity on direct review for all new constitutional rules.

A long and consistent line of precedent conclusively establishes that the right to have a fact determined by a jury rather than a judge was not so central to the accuracy of the trial as to require retroactivity under the test in effect before *Teague*. The accuracy-enhancing prong of the second *Teague* exception is a more restricted version of the purpose prong of *Stovall*, and hence the further expansion of the jury trial right in *Apprendi* and *Ring* necessarily fails to qualify.

The Ninth Circuit majority opinion in the present case seeks to avoid this result with a long and mostly irrelevant discussion of the purported advantages of jury *sentencing* versus judge sentencing, and with criticism of the informality of Arizona penalty-phase proceedings. See 341 F. 3d, at 1109-1116. Tellingly, the opinion relies on Justice Breyer's opinion concurring in the judgment in *Ring*. See *id.*, at 1115. Justice Breyer's opinion was based on his belief that the Eighth Amendment, not the Sixth, requires the jury to determine the sentence, not just eligibility. See *Ring*, 536 U. S., at 613-614. Whatever the intrinsic merits of this belief, it is not the law. *Proffitt* v. *Florida*, 428 U. S. 242 (1976) is the law, and it unequivocally rejected the proposition "that jury sentencing is constitutionally required." *Id.*, at 252 (lead opinion); see also *id.*, at 260-261 (White, J., concurring in the judgment) (Florida procedures were constitutional).

Ring "has nothing to do with jury sentencing. What [*Ring*] says is that the jury must find the existence of the *fact* that an aggravating factor existed." *Ring*, 536 U. S., at 612 (Scalia, J., concurring) (emphasis in original); see also *id.*, at 597, n. 4 (opinion of the Court) ("claim is tightly delineated," no argument on "ultimate determination"). The Ninth Circuit claims accuracy-enhancing status for *Ring* because of the "role of a jury in capital cases to make the important *moral* decisions inherent in rendering a capital verdict." 341 F. 3d, at 1113 (emphasis added). The "moral judgment" decision in capital sentencing, though, is the selection decision, not the eligibility decision, see *supra*, at 10, and *Ring* does not require a jury to make the selection decision. "Those States that leave the ultimate life-or-death decision to the judge may continue to do so . . . ." *Ring*, *supra*, at 612 (Scalia, J., concurring).

This Court has repeatedly explained "the critical difference in the two functions" of the eligibility finding and the sentencing decision. *Shafer* v. *South Carolina*, 532 U. S. 36, 50 (2001). Justice Kennedy explained it in his opinion for the Court in *Tuilaepa* v. *California*, 512 U. S. 967 (1994), see *supra*, at 9, and Justice Ginsburg explained it again in *Shafer*. "[T]he existence of a statutory aggravator [is] a tightly circumscribed factual inquiry . . . . The jury, as aggravating circumstance factfinder, exercises no sentencing discretion itself." *Shafer*, *supra*, at 51. The "moral judgment" aspect of the process comes in when the sentencer decides "whether to impose the death penalty . . . ." *Ibid.* In other words, it comes in when the decision is made on the "ultimate determination" that *Ring* unequivocally stated was *not* at issue in that case.

"If there is any place where adherence to evidentiary rules, constitutional restraints, and the defendant's confrontation rights is paramount," the Ninth Circuit majority declares, "it must be when the defendant is exposed to the penalty of death." 341 F. 3d, at 1113. This is a stunningly irrelevant statement. Nothing in *Ring* even remotely suggests that the formal rules of evidence at trial are constitutionally required for the penalty

phase, and the contrary rule is thoroughly established in precedent. See, *e.g.*, *Romano* v. *Oklahoma*, 512 U. S. 1, 7-8 (1994). Of course, the defendant's confrontation rights must be respected, as well as more general fairness in refuting the evidence against him, but that rule is *Gardner* v. *Florida*, 430 U. S. 349 (1977), not *Ring*. *Ring* adds little or nothing on this point to the pre-existing protections of the *Gardner* line of cases, and it is only the increments over pre-existing protections that matter in *Teague* analysis. See *Sawyer* v. *Smith*, 497 U. S. 227, 244 (1990). As for the blanket term "constitutional restraints," this Court rejected 15 years ago the notion that *Teague* would not apply to the penalty phase of capital cases, see *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989), and Congress's implicit endorsement of the *Teague* line in the Antiterrorism and Effective Death Penalty Act of 1996 precludes reopening that question. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000); *id.*, at 382 (opinion of Stevens, J.) (rules that are "new" for *Teague* are not "clearly established" for 28 U. S. C. § 2254(d)(1)).[7]

Ring requires that the factor which makes the convicted murderer eligible for the death penalty be found by a jury, but it does not increase the reliability of that determination significantly, if at all. Its rule is based on other considerations. See *Ring*, 536 U. S., at 607. The rule fails the *Desist* prong of the second *Teague* exception. *Ring* is not retroactive on habeas corpus.

C. Fundamental Fairness and Jury Trial.

The second (*Mackey*) prong of the second exception has been variously stated, but the phrase "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 314, will suffice

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7. This disposes of Judge Reinhardt's concurring opinion, which is little more than a call to overrule *Penry* and apply all new constitutional rules with full retroactivity on habeas corpus in capital cases. See 341 F. 3d, at 1122-1125.

here. *Ring* unambiguously disclaims fairness as the basis of its holding. See 536 U. S., at 607. Justice Cardozo's opinion in *Palko* v. *Connecticut*, 302 U. S. 319 (1937), invoked by Justice Harlan in *Mackey*, expressly names jury trial as one of the rights that is "*not* of the very essence of a scheme of ordered liberty." See *id.*, at 325 (emphasis added). "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" jury trial. *Ibid.*

Any contention that jury trial is an "absolute prerequisite to fundamental fairness" simply cannot be reconciled with the fact that jury trial is not required in juvenile proceedings. In *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971), the plurality noted that jury trial is neither "a necessary component of accurate factfinding," *id.*, at 543, nor "a necessary part of every criminal process that is fair and equitable." *Id.*, at 547. In other words, it passes neither requirement for the second *Teague* exception. Justice Brennan, concurring in the judgment in one of the joined cases and dissenting in the other, said "the question in these cases is whether jury trial is among 'the essentials of due process and fair treatment,' *In re Gault*, 387 U. S. 1, 30 (1967) . . . ." *Id.*, at 553. His answer was no, provided other safeguards were observed. *Id.*, at 554-556.

Similarly instructive is the more recent decision in *Johnson* v. *United States*, 520 U. S. 461 (1997). Johnson's claim was essentially identical to Summerlin's. An element of the offense of perjury—materiality—was determined by the judge rather than the jury, in accordance with the case law at the time of trial. See *id.*, at 464; cf. *Ring*, 536 U. S., at 609. Because Johnson had not objected, her appeal on that point was subject to the "plain error" rule. This Court decided unanimously that "there is no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " 520 U. S., at 470.

How could it be seriously maintained that nonobservance of an "absolute prerequisite to fundamental fairness" could ever fail to "seriously affect the fairness . . . of judicial proceedings"? "Absolute prerequisite" is a far more stringent standard than "seriously affect." This case is different from *Tyler* v. *Cain*, 533 U. S. 656, 666-667 (2001), where the second *Teague* exception and the structural error rule, although overlapping, were different in ways such that neither mandates the other. The second *Teague* exception and the fourth prong of the plain error test both focus on fairness, but *Teague* does so in much more restrictive terms. See *O'Dell* v. *Netherland*, 521 U. S. 151, 167, n. 4 (1997) ("inevitable that . . . 'miscarriage[s] of justice' will occur"). A rule which implicates the fairness of the trial so minimally as to fail that fourth prong is not remotely close to qualifying for *Teague*.

To qualify for the second exception, *Ring* would have to meet both the *Desist* and *Mackey* criteria. It meets neither. *Ring* is not retroactive on habeas corpus.

III. There is grave danger that the "annually improvised" jurisprudence of capital punishment is killing innocent people through lost deterrence.

The single greatest difficulty in the modern era of capital punishment has been the constantly changing state of the case law. Practices expressly approved one year are struck down in another, and new, previously unknown restrictions are discovered lurking in the Constitution, seemingly without end. In his dissent in *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992), Justice Scalia referred to "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence . . . ." The price for this constant churning is not just in judgments, finality, and the cost of retrials, as important as those are. The cost may very well include the lives of innocent people.

In the past several years, there has been a sea change in the scholarly literature of the deterrent effect of capital punishment. Although not unanimous, the preponderance of recent studies indicates that a death penalty which is actually enforced saves

innocent lives in large numbers. Conversely, the obstruction of the execution of deserved sentences of guilty murderers for reasons having no bearing on the reliability of the guilt verdict diminishes the deterrent effect. Put more bluntly, retroactivity kills innocent people.

One of the reasons for the change is simply the availability of significant amounts of data from the period after *Gregg* v. *Georgia*, 428 U. S. 153 (1976). The early, controversial work of Isaac Ehrlich showing deterrence and the contrary results of his critics were all obtained with data from a system of capital punishment which no longer exists. See H. Dezhbakhsh & J. Shepherd, The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment," Emory U. Econ. Working Paper 03-14, pp. 6-7 (July 2003) (available at http://people.clemson.edu/~jshephe/CaPuJLE_submit.pdf) (summarizing early studies) (cited below as "Judicial Experiment"). *Furman* v. *Georgia*, 408 U. S. 238 (1972) declared this system unconstitutional in part because the large number of potentially capital offenses and the standardless imposition of the death penalty on a very small portion of those eligible could not be expected to produce a deterrent effect. See *id.*, at 312 (White, J., concurring).

Yunker, A New Statistical Analysis of Capital Punishment Incorporating U.S. Postmoratorium Data, 82 Social Science Q. 297 (2001) showed the effect of this change by using the methodology of earlier studies on data before and after *Gregg* without attempting any other improvements. "Whatever advance is achieved over the many previous studies of the question comes simply from the incorporation of additional data." *Id.*, at 298. The additional data alone were sufficient to show a deterrent effect "statistically significant at a high level of confidence (approximately 95 percent)." *Id.*, at 310.

Along with the post-*Furman* reforms in the death penalty system, more recent studies also have available better data from improved collection systems. Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of

Capital Punishment, 46 J. L. & Econ. 453, 455-456 (2003) discuss some of the difficulties with past data sets and the improvements now available.

The third change in recent years is that the science of econometrics, like most sciences, moves forward. Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, 352-361 (2003) discuss improved data and methods, including adjustments in response to criticisms of earlier studies. They conclude, "our most conservative estimate is that the execution of each offender seems to save, on average, the lives of eighteen potential victims. (This estimate has a margin of error of plus and minus ten)." *Id.*, at 373. Mocan and Gittings estimate a smaller but still very substantial deterrent effect of five innocent lives saved for each murderer executed. See 46 J. L. & Econ., at 474.

Three studies not yet published are worth noting here. P. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, Soc. Sci. Res. Network (March 2003) (unpublished manuscript) (available at http://ssrn.com/abstract=354680), estimates 14 murders deterred per execution. Z. Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, E. Econ. J. (forthcoming) (manuscript available at http://ssrn.com/abstract=352681), refutes the common, simplistic argument that the mere comparison of murder rates in states that do and do not have capital punishment disproves the deterrent effect. J. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, Working Paper (Aug. 2003) (available at http://people.clemson.edu/~jshephe/DPpaper_fin.pdf), finds that long delays on appeal cost innocents lives by reducing the deterrent effect.

One of the difficulties in this field of study is the inability to do controlled experiments to confirm or refute hypotheses in the way that can be done in the physical sciences. However, some studies have been done on the "quasi-experiments"

created by suspensions of capital punishment. Cloninger & Marchesini, Execution and Deterrence: A Quasicontrolled Group Experiment, 33 Applied Econ. 569, 575 (2001), found that over 200 lives were lost as the result of a one-year suspension in Texas, although Sorensen, et al., Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinq. 481, 489-491 (1999), found no deterrent effect from an examination of the same suspension.[8] Dezhbakhsh & Shepherd, "Judicial Experiment," *supra*, studied the *Furman* moratorium as well as individual states' suspension and reimposition of the death penalty. They found that suspension or abolition of the death penalty increases murder rates, and reinstatement lowers them.

The Mocan and Gittings study is the most directly pertinent to the present case. In addition to the usual study of the effect of executions, they studied specifically the effect of removals from death row, *i.e.*, commutations and appellate reversals of sentences. Their stark result is that removals kill people. "[O]ne additional removal from death row generates about one additional homicide." 46 J. L. & Econ., at 474.

We do not, of course, claim these studies as conclusive proof. The difficulty, if not impossibility, of definitively proving either side of this debate has long been known. See, *e.g.*, *Furman*, 408 U. S., at 395-396 (Burger, C. J., dissenting) ("empirical stalemate"). Even so, there is now a formidable body of empirical evidence to confirm what common sense has always told us—the death penalty will deter murders and save lives if it is actually enforced, and needless obstruction of it will cost lives. Any proposal to wipe out large numbers of sentences validly imposed under the law in effect at the time of

8. This is the only peer-reviewed, direct study cited by Justice Breyer in *Ring* v. *Arizona*, 536 U. S. 584, 615 (2002) (opinion concurring in the judgment). See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 593-594 (1993) (importance of peer-review publication process). The other items cited, a newspaper article and a survey, are entitled to little, if any, weight.

trial must be evaluated in light of the very real possibility that innocent people will die as a result.

Weighed against this grave possibility, we must ask what the likelihood is that Summerlin's trial, or the trial of the others similarly situated, would have come out any differently if he had been given a jury trial on eligibility. The trial judge in this case found two aggravating circumstances, either of which would be sufficient for eligibility: A prior violent felony conviction and commission of the present crime in an especially heinous, cruel, or depraved manner. See 341 F. 3d, at 1090. Nothing short of jury nullification could have prevented a finding that the prior conviction circumstance was true. As for the "especially heinous" circumstance, lay jurors are less likely to be jaded and more likely to be shocked by a brutal murder than is a criminal court judge who sees depravity all the time. It would be an exceedingly rare case where having the jury rather than the judge make the eligibility finding would produce a result more favorable to the defendant.[9]

Arizona and the other States had a massive reliance interest in *Walton* v. *Arizona*, 497 U. S. 639 (1990), a precedent of this Court squarely on point that held their systems were valid. That reliance has already been grievously betrayed by the reversal of the cases that were pending on appeal when *Ring* was decided. In the absence of any substantial likelihood that the procedure complained of made any difference in the outcomes of these cases, there is no justification for aggravating the damage by overturning final judgments. There is good reason to believe that innocent people's lives depend on the enforcement of those judgments.

9. There is at least anecdotal evidence that Arizona's decision to switch to the jury for *both* the eligibility and selection decisions has *increased* the number of death sentences. See Greenberger, Death-Penalty Law Backfires, Wall Street Journal, Aug. 6, 2003, p. A4, col. 1.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

January, 2004

Respectfully submitted,

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In The

Supreme Court of the United States

DORA B. SCHRIRO, Director, Arizona Department of Corrections,

Petitioner,

vs.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE ARIZONA VOICE FOR VICTIMS, INC., NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, AND NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI CURIAE* INTEREST

Arizona Voice for Crime Victims, Inc. ("AVCV") works to ensure that Arizona's crime victims' state constitutional rights to justice and due process throughout the criminal justice process are protected. To achieve this purpose, AVCV educates and empowers victims of crime through legal advocacy, crisis response training, and continuing legal education for the judiciary, lawyers and law enforcement.[1]

The vision of AVCV is to establish a compassionate justice system in which crime victims know how to seek immediate crisis intervention when they become victims of crime, are informed of their rights under the Arizona constitution, fully understand those rights, and have a meaningful way to enforce them.

Consistent with this vision is the goal of assisting the judiciary in balancing the Sixth Amendment rights of the accused with the crime victim's right to resolution and need in the community for deterrence. Because of the potentially catastrophic effect this case may have on a victim's right to resolution, AVCV has a strong interest in the outcome of this case.

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[1] This brief is filed with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3(a), copies of letters of consent accompany the brief. Counsel for AVCV, NVCLI, NOVA, and POMC authored this brief. No counsel for the parties authored this brief in whole or in part. No one outside the *amicus curiae* (AVCV, NVCLI, NOVA, and POMC), its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

The National Crime Victim's Law Institute ("NCVLI") is a non-profit educational organization dedicated to defending the dignity and legal rights of crime victims and promoting a fair and balanced criminal justice system through legal education, legal scholarship, legal information resources, and legal advocacy. It operates a legal clinic protecting victims through legal action and has a strong interest in defending victims' rights to finality.

The National Organization for Victim Assistance ("NOVA") is a private, nonprofit organization of victims and victim advocates, including legal professionals, who are committed to the recognition and implementation of victims' rights and services. Founded in 1975, NOVA is the oldest national group of its kind in the worldwide victims' movement. NOVA's mission is to promote rights and services for victims of crime and crisis everywhere. Its experience is described in the following review of its guiding purposes.

The National Organization of Parents of Murdered Children ("POMC") provides the ongoing emotional support needed to help parents and other survivors facilitate the reconstruction of a "new life" and to promote a healthy resolution. Not only does POMC help survivors deal with their acute grief, but with the criminal justice system as well. POMC provides training to professionals in such fields as law enforcement, mental health, social work, community services, law, criminal justice, medicine, education, religion, the media and mortuary science, who are interested in learning more about survivors of homicide victims and the aftermath of murder.

These four organizations have come together in support of victims to ensure that justice is applied across the board to both victims and defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona's Supreme Court and the Court of Appeals for the Ninth Circuit have reached different conclusions about whether the new sentencing scheme enacted as a result of *Ring v. Arizona* is to be retroactively applied to capital cases on collateral review. 536 U.S. 584 (2002). This court has granted certiorari to hear this case from the Ninth Circuit Court of Appeals specifically to answer two questions:

1) Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality)?

2) Did the Ninth Circuit err by holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock principles and seriously enhance the accuracy of the proceedings?

Looking at this scenario from the viewpoint of the many victims in this case, and from the time-honored views of Justice Harlan on the rules for retroactivity, this Court should hold that the new sentencing procedure established by *Ring* is to be applied prospectively only. Justice serves all in this nation: defendants and victims.

Arizona is especially cognizant of how new procedures and legislation affect victims because the people of Arizona have affirmatively afforded victims constitutional rights.

If *Ring* is applied retroactively to the capital cases that have exhausted their state court remedies, it would have a devastating effect on the health and well-being of the victims. Victims suffer not only the traditional issues of grief over losing a loved one, but they suffer from issues unique to those whose loved one was murdered, including general anxiety disorders, Post-Traumatic Stress Disorder, and other issues specifically related to the trauma of violence and murder. This court must consider the traumatic impact of resentencing these capital cases would have on the victims finding or keeping any sense of resolution.

The death that occurs by violence is much different for the loved ones than a death by natural causes or accident.[2] Homicide survivors experience degrees of impairment including physical effects, psychological suffering, financial problems, emotional suffering, and social problems. Unlike traditional grieving periods, homicide survivors have a more difficult experience due to many complicated factors unique to murder cases.

Applying new rules to old findings sets a scene of ever-changing jurisprudence that undermines the sense of resolution and stability the people place in the justice system. No one benefits if convictions are constantly

[2] Victims of Violence "Homicide Survivors." <http://www.victimsofviolence.on.ca/homsur.html> (Accessed December 27, 2003). Most information in this section will come from this site, unless noted otherwise.

subjected to new litigation, especially when courts disagree so often. Victims need reasonable resolution.

Applying *Ring* retroactively to these capital cases would eliminate any sense of resolution. In *Teague*, this court relied on finality to set the rules for retroactive application of new jurisprudence. Reviewing the new sentencing scheme under a *Teague* analysis reveals that *Ring* fails to meet any requirement for retroactive application. *Ring* is a procedural change to the sentencing scheme, not a substantive change. *Ring* also fails to fall within either of the two *Teague* exceptions to procedural changes. Therefore, *Ring* is not required to be applied retroactively.

This Court can and should maintain its application of justice to all involved and determine that *Ring*, and Arizona's new sentencing scheme applies prospectively only. By this, the victims can be saved from retraumatization and continue to find resolution to their life-altering grief.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE CAPITAL PUNISHMENT SENTENCES FOR MURDERERS THAT WERE TRIED, CONVICTED, AND SENTENCED UNDER THE EFFECTIVE LAW AT THE TIME OF THEIR SENTENCING BECAUSE THE COMMANDS OF JUSTICE SERVE BOTH DEFENDANTS AND VICTIMS.

Currently, eighty-eight convicted murderers, who are not entitled to relief under Arizona's state courts, are on Arizona's death row. These criminals were tried, convicted,

and sentenced under the prevailing law at the time of their trials. They have exhausted their state court remedies.

Per this Court's decision in *Ring*, Arizona's procedure for carrying out its capital law sentencing has changed. Prior to *Ring*, Arizona, like Colorado, Idaho, Montana, and Nebraska, operated under a system of judges determining and setting the final sentence.[3] Four other states use a similar combination of judge and jury final determinations. This Court decided in *Ring* that the Sixth Amendment requires a jury to make any finding of fact that lengthens a sentence, including aggravating factors for felony murder that allows imposition of a death sentence. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Ring did not address the retroactivity of this new determination, even though the issue was put before this

[3] Bryan A. Stevenson. "Two Views on the Impact of *Ring v. Arizona* on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing." 54 Ala. L. Rev. 1091, 1095 (2003).

Court by our *amici curiae* brief submitted at that time.[4] In her dissent in *Ring*, Justice O'Connor predicted this situation occurring, but she saw a foregone conclusion that the death row inmates who had already completed their direct appeals would be barred from federal collateral review by *Teague v. Lane*, 489 U.S. 288 (1989).[5] Currently, Arizona is left with death row inmates and victims who wait in limbo wondering if the final sentencing determination is truly final.

Now Arizona is in a state of confusion about the current status of capital punishment for these convicted murderers. There should not be such confusion. The laws, as they read plainly, are simple and straightforward. A person is tried, convicted, and sentenced for murder per the law. Capital punishment is requested, and, if appropriate, is imposed. No changes have been made to the crime, the sentence, or the factors influencing the sentence. Should it matter for these eighty-eight convictions that the actual procedure for determining sentencing has changed? The substantive law for the elements of murder,

[4] Please *see Amici Curiae* brief submitted on behalf of Respondent in *Ring v. Arizona*, 536 U.S. 584 (2002) by Arizona Voice for Crime Victims, Inc. and the National Crime Victim Law Institute.

[5] *Ring*, 536 U.S. at 620-621. "The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. There are 168 prisoners on death row in these States, each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review." (internal cites omitted).

its penalty ranges, and the requirements to be met for capital punishment remain unchanged.

The issue that this Court is addr ssing stems from conflicting rulings by the Arizona Supreme Court and the Ninth Circuit Court of Appeals. Arizona's Supreme Court has determined that *Ring* is not retroactive. *State v. Towery*, 64 P.3d 828 (Ariz. 2003) (decision consolidating four capital cases).[6] Yet, concurrently, the Ninth Circuit has determined that *Ring* applies retroactively to cases on collateral review. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (en banc). These are two standards that cannot coexist. This confusion is spilling over to other districts that are awaiting this Court's decision to settle their own actions regarding their pre-*Ring* capital convictions.[7] This Court must settle the conflict in the best interests of the people of Arizona, the people of this Nation, and for the surviving victims of the murders.

In deciding whether to apply the *Ring* decision retroactively, this Court should consider the full effects of the decision. Holding new sentencing trials for the convicted murderers who have reached their final appeals would have disastrous effects on the victims and the people's faith in the judicial system.

[6] *Id.*

[7] *See Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002) (finding *Ring* is a procedural rule change like *Apprendi*); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003) (finding *Ring* changed a procedural rule); *United States v. Battle*, 2003 U.S. Dist. LEXIS 17987 (N.D. Ga. Sept. 22, 2003) (finding the sentencing procedure to be a split authority among circuits, therefore grounds for appeal).

A. Victims deserve justice, and should not be forced to suffer twice.

The new sentencing procedure in Arizona should only be applied prospectively to ensure justice for all. Retroactive application would force the surviving loved ones of homicide victims to suffer twice. The surviving loved ones are considered "victims" under Arizona law, and are fully entitled to all the rights of victims of crime under the Victim's Bill of Rights.[8] These victims have the constitutional right, under Arizona's Constitution, "[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."[9]

When enacting the Victim's Rights Implementation Act, Arizona's legislature established its intent beyond any doubt to protect the rights of victims. The legislative intent section to the Victim's Rights Implementation Act states:

> The legislature recognizes that many innocent persons suffer economic loss and personal injury or death as a result of criminal acts. It is the intent of the legislature of this state to:

[8] Arizona Constitution, Art. II, § 2.1(C) states "'Victim' means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused."

[9] Arizona Constitution, Art. II, § 2.1(A)10 states that victims are entitled "To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."

1. Enact laws that define, implement, preserve and protect the rights guaranteed to crime victims by Article II, § 2.1, Constitution of Arizona.

2. Ensure that Article II, § 2.1, Constitution of Arizona, is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals.

3. Ensure at all stages of the criminal justice process that the duties established by Article II, § 2.1, Constitution of Arizona, are fairly apportioned among all law enforcement agencies, prosecution agencies, courts and corrections agencies in this state.

4. Ensure that employees of this state and its political subdivisions who engage in the detention, investigation, prosecution and adjudication of crime use reasonable efforts to see that crime victims are accorded the rights established by Article II, § 2.1, Constitution of Arizona.[10]

Capital cases linger for many years due to the number of appeals a convicted person is allowed.[11] Surviving

[10] Arizona Revised Statutes § 13-4401 *et seq.*

[11] According to the U.S. Department of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment 2002, page 11. < http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf> (released November 2003), in 2002, there was an average of 127 months (10 years, 7 months) lapse of time between original sentencing and carrying out of the death penalty. However, **in Arizona**, the length of time between sentencing and execution after the appeal process is completed ranges from **9.9 years to 24 years**, with a median of 17.4 years. Janet Napolitano, Attorney General of Arizona. "Capital Case Commission Final Report: Attachment B." <http://www.attorneygeneral.state.az.us/CCC/FinalReport.html> (December 31, 2002).

victims have already waited many years for the murderers to exhaust their appeals. Now, when they have reached the point of seeing the end of the process at hand, the Ninth Circuit's *Ring* decision raises the specter that the promise of resolution will vanish, leaving victims to suffer through the long process of resentencing and appeals again. And in the process, the Ninth Circuit's *Ring* ruling would give murderers more opportunities to escape the sentence that was fairly handed down under the laws in place at the time. It would take years to resentence these murderers. The victims in these cases, estimated at seven to ten close relatives per murder, not including friends, coworkers, and neighbors,[12] thought they had found resolution, something that is critical to recovery from any form of grief or loss. Allowing the Ninth Circuit's *Ring* ruling to stand would deprive the victims of the resolution and finality that they so desperately need.

The Judiciary Committee's report to the United States Senate on the proposed Crime Victims' Rights Amendment (which was reported favorably to the Senate November 11, 2003), reported that:

> Victims, too, as well as society as a whole, have an interest in the prompt resolution of criminal cases. "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed."

[12] National Center for Victims of Crime. Victim Assistance: Get Help Series: "Homicide Survivors: Introduction." <http://www.ncvc.org/gethelp/homicidesurvivors/> (Accessed December 17, 2003). (citing grief expert Lu Redmond).

> For victims, "[t]he healing process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence."[13]

The report went on to state that sometimes the interests of victims, society, and the government are not necessarily the same as the interests of defendants or that these interests are reflected in the Sixth Amendment. Collene Campbell, a homicide survivor testified to the Committee:

> I'm certain this is not what the Founders of this great nation and the authors of our Constitution intended and it needs to be corrected immediately. At a huge cost to taxpayers, and my families [sic] personal life, we have continued to be in the court system for 21 straight years, with no right for a speedy trial and there is no end in sight.[14]

Many victims cannot begin the healing process until the case is behind them. Even worse for victims would be the scenario ordained by the Ninth Circuit's holding in this case, where victims would have to go through the criminal process again after they thought it was behind them.

If a new sentencing trial is held, these victims must reopen old wounds. Some of the victims are likely witnesses, and would have to testify again. Media coverage

[13] Sen. Jud. Comm. Rep. 108-191, at p. 27 (November 7, 2003) (Report on the Crime Victims' Rights Amendment, Joint Resolution (S.J. Res. 1), language adopted by the majority, to be adopted without amendment) (quoting the President's Task Force on Victims of Crime, Final Report 75 (1982)).

[14] *Id.* at 28. ("families" in original).

would resume. Resolution and recovery would be lost; all the more precious for the short time they may have found it; all the harder to find a second time.

1. Victims suffer anxiety disorders

Homicide victims can experience various degrees of anxiety disorders in reaction to the traumatic event of the murder. Experiencing a violent crime, or the loss of a loved one to a violent crime, can cause Acute Stress Disorder within the first two to four weeks of the occurrence.[15] Victims with this anxiety disorder may experience flashbacks, dissociation (feeling detached from one's emotions or body), hyperarousal, generalized anxiety, and avoidance of reminders of the event. However, if these behaviors persist beyond one month and become associated with functional impairment, then the victim is experiencing post-traumatic stress disorder ("PTSD"). PTSD is divided into three categories: 1) acute (less than three months), 2) chronic (greater than three months), and 3) delayed onset (starts after six months from the traumatic event). About half of PTSD cases subside within six months, but others can last the remainder of the person's life.

It is estimated that at least 13 million people in America have PTSD at any one time.[16] Of these, 14.3% are at risk to develop PTSD following the unexpected death of

[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, page 467 (4th ed., 1994), Washington, D.C.

[16] PTSD Alliance. "About PTSD: Statistics" <http://www.ptsdalliance.org/about_what.html> (Accessed December 29, 2003).

a family member or friend, and another 7.3% as a witness to killing or serious injury.[17]

PTSD involves very serious changes in a person's life. People with PTSD suffer many problems. They may re-experience the event (flashbacks, nightmares, panic attacks), have uncontrollable anger, be unable to sleep, avoid reminders of the event (meaning avoiding anything that reminds them of the lost loved one), have problems breathing and heart palpitations, feel as if they are in constant danger, withdraw from friends and loved ones, be easily startled, shut down emotionally, suffer memory lapses, be unable to concentrate, stop feeling pain or other sensations, and lose interest in previously enjoyed activities. There can also be secondary and associated effects which complicate recovery.

2. Victims have atypical grief

The death that occurs by violence is much different for the loved ones than a death by natural causes or accident.[18] Homicide survivors experience degrees of impairment including physical effects, psychological suffering, financial problems, emotional suffering, and social problems. Unlike traditional grieving periods, homicide survivors have a more difficult experience due to many factors including:

[17] *Id.*

[18] Victims of Violence "Homicide Survivors." <http://www.victimsofviolence.on.ca/homsur.html> (Accessed December 27, 2003). Most information in this section will come from this site, unless noted otherwise.

- media coverage,
- lack of privacy,
- inability to grieve in private,
- having to identify the victim's body,
- pain in the knowledge that the victim suffered,
- dealing with gruesome circumstances of the crime,
- in some cases, survivors may be witnesses to the murder,
- blame,
- finding the murderer,
- if they knew the killer,
- feeling they could have prevented the death,
- thinking "what if . . . ,"
- loss of security, safety and trust,
- fear of the murderer or fear the murderer may hurt someone else,
- nightmares and images of the loved one being murdered,
- increased sensitivity toward news or images of violence,
- fear the murderer may never be found or punished, and
- wondering why the victim was killed.[19]

[19] *Id.*

Additionally, hearing witnesses and attorneys discuss the murdered person as a piece of evidence depersonalizes the event, and does not contribute to the healthy grief of a loved one. Homicide survivors must deal with traditional issues of grief, anxiety complications, and atypical grief complications while trying to find resolution.

3. There are other losses for victims

Homicide survivors go through many changes in addition to their personal reaction to grief and shock.[20] Often their lifestyles must change, as well as their interaction with the world they live in. Frequently, the survivors feel a sense of loss of self along with a sense of losing control over their lives. They may lose their independence or feel as if they must now depend more on others, including institutions they may rely on to address the crime. Loneliness and isolation increase, leading to a loss of social support and social standing in some cases. Their sense of safety and security may diminish, as well as their loss of religion or faith. For people of certain religions, questioning the "why" behind the action, understanding the rationale may be hard to internalize. In certain cases, the physical change to their living environment or community requires adaptation. Just as the terrorist attacks of September 11, 2001 mandated changes to traffic, travel routes, maps, businesses, and much more, these victims

[20] National Center for Victims of Crime. Victim Assistance: Get Help Series "Homicide Survivors: Other Losses." < http://www.ncvc.org/gethelp/homicidesurvivors/> (Accessed December 17, 2003). The information for other losses all come from this site.

must reroute their entire lives around the physical loss of a loved one.

The homicide survivors as the victims in these eighty-eight cases were "lucky" enough to reach partial completion and find some sense of resolution. The faith they found in the legal system with the successful conviction, and successful sentencing, may be lost if another sentencing trial must be held. If this court determines that *Ring* applies retroactively, these victims must suffer again. Whatever level of healing they may have reached, whatever justice they found, will be lost.

B. No one benefits, including the convicted murderer, if a criminal is sentenced today, but is subject to fresh litigation tomorrow.

Finality is a core value of Arizona's criminal justice system. Since statehood, Arizona's Constitution promises its citizens that "Justice in all cases shall be administered openly, and without unnecessary delay."[21] The people of Arizona amended the state constitution in 1990 to reaffirm explicitly this promise of finality for crime victims.[22]

In the interests of preserving the due process, fairness and finality rights that Arizona has promised to its crime victims, this Court should determine that the *Ring* capital

[21] Arizona Constitution, Art. II, § 11.

[22] At the November 6, 1990 General Election the voters of Arizona passed Proposition 104 which added the Victim's Bill of Rights, Article II, § 2.1. The Victim's Bill of Rights became effective November 26, 1990 when the election results were proclaimed by the governor.

sentencing procedure is to be applied prospectively only, as is consistent with *Teague v. Lane,* 489 U.S. 288 (1989) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[23]

In Arizona's Supreme Court decision in *Towery*, the court declared "Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a 'prompt and final conclusion of the case after the conviction and sentence.'" 204 Ariz. at 391 (quoting Ariz. Const. Art. II, § 2.1(A)(10)).

Arizona's Supreme Court's holding in *Towery* continues to follow and uphold the important principles of finality that have underscored this Court's criminal justice jurisprudence. Justice Harlan's opinion on the significance of adherence to finality has become the foundation for this Court's jurisprudence on retroactivity.[24] The importance of finality and the role of non-retroactivity was quite succinctly put when this Court stated in *Teague*: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal

[23] *See United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (*Apprendi v. New Jersey* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions).

[24] *See Teague v. Lane*, 489 U.S. 288, 303 (1989) (discussing *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion concurring in judgments in part and dissenting in part).

justice system. Without finality, the criminal law is deprived of much of its deterrent effect." 489 U.S. at 309.

Furthermore, the rationale behind finality is that "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation" *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

C. The State has a strong interest in *Ring* being prospective only

"Only with the assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing that the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and crime victims alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citing *Herrera v. Collins*, 506 U.S. 390, 421 (1993)).

In *Towery*, when holding that *Ring* did not apply retroactively, Arizona's Supreme Court concluded its holding by stating:

> Finally, applying *Ring II* retroactively would greatly disrupt the administration of justice. As recognized previously, courts must protect a victim's rights by ensuring "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. Art. II, § 2.1(A)(10). Arizona has approximately ninety prisoners on death row whose cases have become final and

> who received a sentence based upon the aggravating circumstances found by the trial judge and affirmed on appeal. Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice. As in *DeStefano [v. Woods]*, "the values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons" sentenced to death "by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. [631] at 634, 88 S. Ct. [2093] at 2095. Moreover, vacating those prisoners' sentences without substantial justification would violate this court's duty under the Victims' Bill of Rights.

204 Ariz. 386, 393, 394. (information in brackets added).

The State must balance the rights of the defendants against the rights of the victims. This task is easier when guilt of the defendant is not in question. No one has questioned that the sentences were imposed fairly or impartially, just that judge-only sentencing was inconsistent with the Sixth Amendment. *See Towery*, 204 Ariz. at 391. Thus, the State's requirement of a fair and impartial trial was met. A fair and impartial sentencing determination was made under the law available at the time – which had been expressly endorsed by the United States Supreme Court in several cases. [25]

[25] *Towery*, 204 Ariz. at 393 (citing *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466, 496-497 (2000)).

II. THIS COURT SHOULD MAINTAIN ITS JURISPRUDENCE ESTABLISHED IN *TEAGUE* BY HOLDING THAT *RING* CANNOT JUSTIFIABLY APPLY RETROACTIVELY TO FINAL CONVICTIONS.

If this Court were to apply an abolition of Arizona's capital sentencing structure retroactively, it would have a devastating effect on hundreds of innocent Arizona families – the loved ones of murder victims who must suffer through years of resentencing procedures waiting for justice to be done. In *Morris v. Slappy,* this Court urged that "in the administration of criminal justice, the courts may not ignore the interests of victims." 461 U.S. 1, 14 (1983).

The Court should consider the interests of crime victims if it holds for the Respondent. Retroactive application of the holding sought by the Respondent would require the reversal of death penalty final judgments and force hundreds of innocent victims to endure the uncertainty, pain, and hardship of future sentencing proceedings. The cost of applying such a holding retroactively would fall most heavily on victims by betraying the promise of resolution and creating decades of unnecessary litigation. In addition, the financial costs of prosecuting and sentencing capital cases are extremely high.[26] If these

[26] Linda M. Williams, PhD. "Case Study on State and County Costs Associated with Capital Adjudication in Arizona: Data Set III Research Report to Arizona Capital Case Commission." Submitted by the Williams Institute. <http://www.ag.state.az.us/CCC/Attachment%20D%20-%20Data%20Set%20III.pdf> (July 2001). According to this report, the time for the guilt phase of a trial ranges from four to nine days. The sentencing phase has a median time of 200 days. The total costs of both

(Continued on following page)

sentencing trials are held again, this Court must consider the burden to the people of a new trial, taking into account that there will now be jury costs for new sentencing trials. Furthermore, the sheer difficulty of a stale case – on both sides – must also be considered. This is not the application of justice, it is politics. The State will be forced to pursue the capital sentences that it can fundamentally afford to pursue. This will inevitably deny justice to those victims who are left behind.

Customarily, a newly created or newly adopted rule of constitutional law cannot be applied retroactively to a judgment and sentence that is final unless the rule fits into one of two exceptions under *Teague,* 489 U.S. at 306. First, a prisoner whose conviction is final can invoke a new rule if the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1963)). This generally applies to new rules making certain conduct exempt from the legislature's power to define criminal acts and is not implicated by *Apprendi. Id. Apprendi* held factual determinations that extend sentences must be made by juries, and is a procedural, not a substantive, change. 530 U.S. at 475. *Ring* simply extended *Apprendi*

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phases, ranging in the hundreds of thousands includes attorneys for prosecutors and defense, special investigators, jury costs, experts, and extra costs.

to the capital case context, and must therefore be a procedural rule change.[27]

The second exception requires the new rule to apply retroactively if it is a fundamental rule that ensures accuracy in the outcome of the trial. *Teague,* 498 U.S. at 313. This exception has been construed narrowly to facilitate the finality of criminal convictions, essential to the effective operation of the criminal justice system and its deterrent effect. *Id.* Since *Teague,* this Court has declined to apply retroactive relief to all habeas corpus cases involving legal claims except one, although this Court has reversed decisions based on factual claims.[28]

Even if the error in this case is found to be a structural error it does not mean that it falls within the second prong of *Teague.* This court said in *Tyler v. Cain* that "[t]he second *Teague* exception is available only if the new rule *alters our understanding* of the bedrock procedural elements essential to the fairness of a proceeding. Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process (or even the fundamental requirements of due process alter such understanding)." 533 U.S. 656 (2001).

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[27] *Towery*, 204 Ariz. at 391. (citing *Cannon*, 297 F.3d at 994) ("explaining that the Tenth Circuit's conclusion that *Apprendi* announced a rule of criminal procedure forecloses the argument that *Ring* announce a substantive rule").

[28] *United States v. Mandanici,* 205 F.3d 519, 529 (2d Cir. 2000) (identifying "at least eleven new rules" of criminal procedure announced since *Teague* that this Court has declined to apply the second *Teague* exception and are therefore not retroactive).

Ring clearly should not be applied retroactively under the second *Teague* exception. The conviction remains the same. The aggravation evidence remains the same. In some of the capital cases at issue here, some of the evidence may be much more difficult to present given the lapse in time. Only the sentencer would change if this Court finds for the Respondent and applies Arizona's new capital sentencing structure retroactively. Such a modification does not invoke the narrowly interpreted exception.

That finality has become a bedrock principle of this Court's criminal justice jurisprudence and is unequivocally established in *Teague*. This Court wrote that the

> "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principal of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[29] This Court should not now abandon these bedrock principles but instead take this opportunity to reaffirm them even as the Congress has reaffirmed them on behalf of the American people in the Antiterrorism and Effective Death Penalty Act of 1996.[30] Finally, in deciding whether to apply a rule retroactively, this Court should also look to the core values established in Arizona's criminal justice system.

[29] Tung Yin, "A Better Mousetrap: Procedural Default as a Retroactivity Alternative to *Teague v. Lane* and the Antiterrorism and Effective Death Penalty Act." 25 Am. J. Crim. L. 203, 239 (1998) (quoting *Teague*, 489 U.S. 288, 309 (1989)).

[30] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

> If applying the case retroactively would undermine a core value of that system, it should only do so when there is an express constitutional command. "The Constitution neither prohibits nor requires retrospective effect."[31]

CONCLUSION

Finality is a core value of the Arizona criminal justice system, one that is expressly guaranteed to victims in Arizona's Constitution. This Court should preserve this value unless to do so would contravene a fundamental and express constitutional command. Nothing in the Constitution or in this Court's retroactivity jurisprudence requires such a result. Everything in the eyes of justice demands fair application to all involved, and that includes the victims who would be forced to suffer again – but this time at that hands of justice. This Court should determine that *Ring* applies prospectively only, and not to cases that have already become final, and thus, reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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[31] *Linkletter v. Walker*, 381 U.S. 618, 619-620 (1965).

(9)

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In The
Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEBRASKA, ALABAMA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, INDIANA, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI INTEREST

The State of Nebraska and the 15 amici states have a strong interest in this Court reversing the opinion of the United States Court of Appeals for the Ninth Circuit in this case for the following reasons.

- The 9th Circuit opinion adopts and employs an interpretation of state law in direct conflict with a ruling of that state's highest court upon the identical question. The amici states have a strong interest in having their highest courts respected as the final arbiters of the meaning of their state statutes, consistent with established concepts of federalism.

- The amici states have a very strong interest in preserving the ability of their legislatures to define the behaviors that will be deemed criminal within their respective borders. The 9th Circuit opinion claims that this Court "redefined" a crime under Arizona statutes in *Ring v. Arizona*, 536 U.S. 584 (2002). The amici states desire a clear statement that federal courts are not free to redefine substantive criminal statutes contrary to specific rulings of that state's highest court.

- Because of the disruptive impact upon state criminal justice systems of granting retroactivity to newly announced rules of federal constitutional law, the amici states have a significant interest in seeing that new rules of federal constitutional law are applied retroactively only in the very limited instances anticipated by *Teague v. Lane*, 489 U.S. 288 (1989).

- The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final

judgments of conviction. The amici states desire a clear statement that the holding in *Ring* is not to be given retroactive application in order to apply the rule in *Ring* only in appropriate cases.

- Nebraska and other states which had employed judicial sentencing in capital cases prior to *Ring* had for decades conducted potential capital cases to final judgment in good faith reliance upon this Court's holdings in *Profitt v. Florida*, 428 U.S. 242 (1976), and *Walton v. Arizona*, 497 U.S. 639 (1990). It would be a significant detriment to the states' interest in accurate fact finding, justice, society's perception of justice, and the finite resources of state legal systems, if cases tried and affirmed on direct review in reliance upon *Proffit* and *Walton* were now required to be re-opened, possibly decades after the crime in question.

- The finality of judgments is a significant aspect of the system of justice these states desire to provide their citizens. The 9th Circuit's position in this case unnecessarily erodes that legitimate legal and societal goal.

ARGUMENT

I. A federal court is not free to ignore the rulings of a state's highest court, make up its own interpretation of state statutes, and then evaluate that new interpretation of state law against the requirements of our federal constitution. Respect for the rulings of a state's highest court on questions of state law is one of the fundamental concepts of federalism.

A.

The amici states have a strong interest in having their highest courts be the final arbiters of the meaning of their

state statutes. The 9th Circuit majority's analysis of whether this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) should be given retroactive application to otherwise final criminal judgments ignores that fundamental principle of federalism.

In its attempt to distinguish the Sixth Amendment right recognized in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) from the Sixth Amendment right applied to capital cases in *Ring*, the 9th Circuit majority begins by taking upon itself a responsibility reserved to the states by our federal form of government. It takes upon itself the responsibility to impose upon state statutes a meaning contrary to the meaning given those same statutes by that state's highest court. The 9th Circuit majority asserts:

> In *Ring* . . . the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona.

341 F.3d at 1107.

In stark contrast, the Arizona Supreme Court, in *State v. Towery*, 204 Ariz. 386, 392, 64 P.3d 828, 834 (2003), had previously reached exactly the opposite conclusion with respect to the proper interpretation of Arizona statutes following *Ring*.

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered

> who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

It is not the place of a federal court to substitute its judgment, upon a question of state statutory interpretation, for that of the highest court of that state. As this Court stated in *Johnson v. Fankell*, 520 U.S. 911, 916 (1997): "Neither this Court nor any other federal tribunal has any authority to place a construction upon a state statute different from the one rendered by the highest court of the State." *See also*, *Gurley v. Rhoden,* 421 U.S. 200, 208 (1975) ("[A] state's highest court is the final judicial arbiter of the meaning of state statutes."); and *City of Chicago v. Morale*s, 527 U.S. 41, 41 (1999).

Yet the 9th Circuit majority engaged in exactly that forbidden act here and the product of that act became the lynchpin of that court's erroneous conclusions regarding *Ring* retroactivity.

B.

The pragmatic specter which hangs over this situation is this: If the 9th Circuit majority is correct in their approach, then the legal system of this country could be routinely confronted with *two* radically different interpretations of state law existing simultaneously in parallel universes–one state, one federal.

"[T]he decision of a federal court (even this Court) on a question of state law is not binding on state tribunals."

Leavitt v. Jane L., 518 U.S. 137, 146 (1996) (Stevens, J., dissenting).[1]

> To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so, [citations omitted] and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law.

Leavitt v. Jane L., 518 U.S. 137, 144-145 (1996).

The potential for mischief, misunderstanding and confusion are limitless if federal courts are free to ignore clear interpretations of state law by a state's highest court and create and employ their own divergent interpretations of that state's law.

C.

The 9th Circuit majority attempts to rationalize its ability to ignore the Arizona Supreme Court's ruling in *Towery*, by alleging that *Towery* was really an interpretation of federal law, not state law.[2] However, that assertion ignores the very first inquiry required by an appropriate retroactivity analysis. The first question that must be answered is: Was the statutory definition of the state crime or the facts relevant to that crime's punishment altered by *Ring*? For that answer, the circuit court was

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[1] *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (State courts are not bound by a circuit court's interpretation of federal law, much less state law.)

[2] 341 F.3d at 1106-1107.

obliged to honor that portion of the *Towery* opinion which defines the current state of post-*Ring* Arizona law.

Just as a federal court is not bound by a state court's interpretation of federal law, by the same token a federal court is not free to ignore a state's highest court's pronouncement of state law when measuring state law against the requirements of our federal constitution. Yet that is exactly what the 9th Circuit majority did in this case. The 9th Circuit majority (1) ignored the state law holdings of the Arizona Supreme Court in *Towery*, (2) made up its own version of the substantive law of Arizona, and (3) then applied federal retroactivity standards to its alternative version of Arizona law.

D.

In sharp contrast to the process employed by the 9th Circuit majority below, in deciding *Ring* this Court began it's Sixth Amendment analysis by *relying on* the Arizona Supreme Court's interpretation of the Arizona statutes in question.[3]

[3] "Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz. at 279, 25 P.3d at 1151 (citing Ariz.Rev.Stat. § 13-703) This was so because in Arizona, a 'death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt.'" 200 Ariz. at 279, 25 P.3d at 1151 (citing Ariz.Rev.Stat. § 13-701). 536 U.S. at 597.

Even the 9th Circuit majority relied upon the Arizona Supreme Court's interpretation of Arizona law when it served their purpose.[4]

E.

These states have a strong interest in preserving the power of their highest courts to articulate the meaning of their state statutes, and to have those holdings respected by the federal courts. Thus, the fact that the 9th Circuit majority ignored that fundamental concept of federalism in resolving this case is particularly distressing to these states.

II. The Sixth Amendment guarantees a criminal defendant a particular fact finder. The Sixth Amendment does not define the fact which state law may require that fact finder to consider.

These states have a very strong interest in preserving the ability of their legislatures to define the behaviors that will be deemed criminal within their respective borders.

[4] "[T]he Arizona Supreme Court declared the Arizona death penalty statute to be unconstitutional under the Eighth and Fourteenth Amendments. [citation omitted] The Arizona court acknowledged, after examining the structure of the relevant Arizona criminal statutes, that the Supreme Court, through *Furman*, had 'abolished "capital offenses" in Arizona' substantively." 341 F.3d at 18.

A. The federal courts are not empowered by our federal constitution to either "define" or "redefine" the behavior which a state may deem to be criminal or which merits enhanced criminal sanction. That responsibility rests solely with state legislatures.

In *United States v. Buckland*, 289 F.3d 558 (9th Cir.) (*en banc*), *cert.den.*, 535 U.S. 1105 (2002), the 9th Circuit accurately concluded that this Court's ruling in *Apprendi* was procedural in nature and thus not entitled to retroactive application. The 9th Circuit majority argues that *Ring* can be distinguished from *Apprendi* because *Ring* resulted in "redefining elements of an offense" while *Apprendi* did not.[5] At the outset, that is simply not a correct assessment of what this Court accomplished in *Ring*.

However, of greater concern to these states is this: The 9th Circuit majority's proposition asserts that our federal constitution generally, and the Sixth Amendment specifically, somehow empowers the federal courts to "redefine" a state crime. We believe that to be a fundamentally flawed statement of the relationship between the federal courts and the power of the states to define criminal behavior.

This Court's opinion in *Ring* neither defined nor "redefined" the punishment-enhancing aggravating circumstances enacted by the Arizona Legislature.

[5] 341 F.3d at 17.

B. Nothing in Arizona law was "redefined" by *Ring*.

In *Apprendi,* the punishment-enhancing behavior treated as a functional element of the offense was the "hate crime" aspect of the New Jersey statute. There appears to be agreement that *Apprendi* did not alter the state statutory definition of the *behavior* that would establish that punishment-enhancing fact under New Jersey law.

In *Ring*, statutory aggravating circumstances defined by the Arizona Legislature were the punishment-enhancing facts upon which the inquiry focused. Again in *Ring,* this Court did not alter the definition of a single statutory aggravating circumstance as articulated by Arizona statutes.[6] *Ring* is identical to *Apprendi* in that dispositive respect.

Our analysis here should be focused upon this question: Was any statutorily defined behavior, required to be found in order to expose a guilty defendant to enhanced punishment, altered in its definition by this Court's opinion in *Ring*?

In *Apprendi,* this Court stated:

> *The substantive basis for New Jersey's enhancement is thus not at issue*; the adequacy of New Jersey's procedure is. The strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural

[6] Nor has the State of Arizona altered the definition of its aggravating circumstances as a result of this Court's ruling in *Ring*.

> question than the strength of the interest served by other provisions of the criminal code.

530 U.S. at 475 (emphasis added).

The 9th Circuit majority not only admits, but founds its argument upon, the fact that *Apprendi* did not alter the definition of the punishment-enhancing fact selected by the New Jersey Legislature.[7] We agree with that conclusion. Yet the 9th Circuit majority utterly fails to call to our attention one specific punishment-enhancing fact, defined by the Arizona Legislature, which was "redefined" by this Court's opinion in *Ring*.[8] They fail to do so because it did not happen.[9]

Oddly enough, the 9th Circuit majority opinion later confirms the fact that Arizona's punishment-enhancing facts were not "redefined" by this Court's decision in *Ring* when it finds the first of the *Teague* exceptions not applicable. "Because *Ring* did not 'decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons,' [citation omitted] the first exception is inapplicable to [Summerlin]." 341 F.3d at 1109. That accurate assessment of the impact of *Ring* upon substantive Arizona law should have ended the inquiry required here.

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[7] 341 F.3d at 17, fn 9.

[8] The majority opinion's historical survey of Arizona death penalty law cannot obscure the fact that, in the end, this Court's ruling in *Ring* did not alter the definition of a single, current statutory aggravating circumstance under Arizona law. *See*, 341 F.3d at 18-21.

[9] The majority opinion's reference to *Ring*, 536 U.S. 589-590 (341 F.3d at 1102) in Footnote 9 offers no enlightenment with respect to that alleged distinction.

C. *Apprendi* and *Ring* accomplish exactly the same Sixth Amendment goal.

Apprendi and *Ring* placed exactly the *same* requirements upon both the New Jersey and Arizona penalty phase process, and those requirements were wholly procedural. The Sixth Amendment entitles every criminal defendant to have every guilt-creating or punishment-enhancing fact submitted to a jury. *Ring* in particular teaches that the nature of the punishment is irrelevant to that Sixth Amendment concern. The Sixth Amendment guarantee does not hinge upon whether a finding of fact exposes the defendant to lengthier incarceration or exposes the defendant to the possibility of death. The Sixth and Fourteenth Amendments mandate that a particular level of *process* be provided by the states with respect to *every* fact which operates as a "functional element" of a criminal offense.

Neither *Apprendi* nor *Ring* are observed to tinker with the state-defined, punishment-enhancing facts in question. The Sixth Amendment guarantees a criminal defendant a certain fact *finder*. The Sixth Amendment has no interest in the "definition" of the fact which state law may require to be found. *Apprendi* and *Ring* are, and should continue to be read as, strictly Sixth Amendment cases.

D. *Bousley v. United States* supports Arizona's position in this case.

Although relied upon by the 9th Circuit majority, this Court's opinion in *Bousley v. United States*, 523 U.S. 614, 617-621 (1998), supports Arizona's position that the rule announced in *Apprendi* and applied to capital cases in

Ring is properly classified as procedural rather than substantive. In *Bousley*, a prior ruling of this Court[10] had significantly narrowed a penalty-enhancing element by narrowing the definition of the behavior which exposed a guilty defendant to enhanced punishment *for a federal crime*, thus removing certain behavior from the risk of enhanced punishment.[11] In so doing, this Court performed the same interpretive function with respect to a federal statute which a state's highest court properly performs with respect to state statutes.

In clear contrast to the situation in *Bousley*, this Court did not redefine, much less narrow, the punishment-enhancing behavior described in the New Jersey and Arizona statutes at issue in either *Apprendi* or *Ring*. Furthermore, the change from judicial to lay fact finders required by *Apprendi/Ring* cannot be reliably determined to significantly enhance "the likelihood of an accurate conviction."[12] Therefore, as this Court held in *Boulsey*, "there is no reason to apply the rule retroactively on habeas review."[13]

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[10] *Bailey v. United States*, 516 U.S. 137 (1995)

[11] 523 U.S. at 617.

[12] 523 U.S. at 620. See also, 341 F.3d 1129-1130 (Rawlinson, Circuit Judge, dissenting.) and Argument IV.B below.

[13] 523 U.S. at 620.

III. The significant disruptive impact of retroactive application of new rules of federal constitutional law upon the states supports the conclusion that the very narrow exceptions of *Teague* should be honored, not expanded.

A. The States' interest

The amici states have a significant interest in seeing that new rules of federal constitutional law announced by this Court are applied retroactively only in the very limited instances required by *Teague v. Lane*, 489 U.S. 288 (1989).

These states have a significant interest in the proper classification of this Court's decision in *Ring* as that classification will impact final judgments not only in capital cases, but other criminal judgments of their courts. As this Court has recognized, the cost to the states of affording retroactive application of new rules of federal constitutional law is significant. Retroactivity consumes time and drains finite state resources. More importantly, retroactivity conflicts directly with the desire of the states, their citizens and American society in general to achieve the finality of criminal judgments. *Sawyer v. Smith*, 497 U.S. 227, 222 (1990).

B. A question of time and timing

Capital cases, although relatively few in number, are highly visible and therefore the cases from which citizens routinely draw their impressions of this nation's criminal justice system. *Ring* offers a perfect example of the pragmatic and societal concerns that these states and their citizens have with retroactivity.

Litigation attempting to bring a capital judgment to closure moves at a glacial pace in this country. The criminal judgment presently before this court is over twenty years old.[14] Yet it is the affirmative responsibility of these states to afford a criminal defendant a constitutional trial under the law in effect *at the time of trial*, not at some hypothetical date two or more decades in the future. It is not, and cannot rationally be, the responsibility of these states to provide a criminal defendant a trial satisfying future decisions of this Court announcing new rules of federal constitutional law. This reality is clearly reflected in the two very narrow exceptions allowing retroactivity articulated by *Teague v. Lane*, 489 U.S. 288 (1989).

The 9th Circuit majority does not dispute that Ring was constitutionally tried at a time when *Proffitt v. Florida*, 428 U.S. 242 (1976) and subsequently *Walton v. Arizona*, 497 U.S. 639 (1990) were unequivocal in their approval of judicial fact finding in the penalty phase of a potential capital trial. *Teague* envisions only the most extraordinary of new rules would require states to abandon a twenty-year-old judgment and attempt to begin again.[15] *Ring* is not such a ruling.

[14] The judgment in Nebraska's oldest active capital case is also over twenty years old.

[15] *Tyler v. Cain*, 533 U.S. 656, 667, fn7 (2001) ("[I]t is unlikely that any of these watershed rules "ha[s] yet to emerge." *Sawyer, supra,* at 243, 110 S.Ct. 2822 (quoting *Teague, supra,* at 313, 109 S.Ct. 1060 (plurality opinion)); *see also Graham, supra,* at 478, 113 S.Ct. 892.")

C. *Apprendi* and *Ring* are both procedural. Eighth Amendment concerns do not distinguish these holdings.

Apprendi announced the Sixth Amendment rule in question in a non-capital case. However, this Court made clear the new Sixth Amendment constitutional rule announced impacted only procedural aspects of the penalty phase proceeding. "The strength of the state interests that are served by the hate crime legislation has no more bearing on this *procedural question* than the strength of the interest served by other provisions of the criminal code." 530 U.S. at 475 (emphasis added). The rule announced in *Apprendi* has uniformly been found to be procedural in nature.[16]

In *Ring*, a capital case, the question presented was this:

[16] *Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir. 2003); *United States v. Swinton*, 333 F.3d 481 (3rd Cir. 2003); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *United States. v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir. 2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001).

State v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (Ariz.App. 2001); *Boyd v. State*, WL 22220330 (Ala.Crim.App. 2003) (not yet released for publication); *People v. Bradbury*, 68 P.3d 494 (Colo.Sup.Ct. 2003); *Figarola v. State*, 841 So.2d 576 (Fla.App. 2003); *People v. Gholston*, 332 Ill.App.3d 179, 772 N.E.2d 880, 265 Ill.Dec. 509 (2002); *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001); *Meemken v. State*, 662 N.W.2d 146 (Minn.App. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003); *State v. Hunt*, 582 S.E.2d 593 (N.C. 2003); *Teague v. Palmateer*, 184 Or.App. 577, 57 P.3d 176 (2002).

> [Whether an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

536 U.S. at 597.

This Court answered that question as follows: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609.

In *Ring*, this Court observed, "We see no reason to differentiate capital crimes from all others in this [Sixth Amendment] regard." 536 U.S. at 607.

Directly contrary to that reasoning, the 9th Circuit majority attempts to place an Eighth Amendment gloss upon the purely Sixth Amendment question presented here – an Eighth Amendment gloss that this Court had affirmatively stripped away only a year before in *Ring*. The 9th Circuit majority's attempt to resurrect an Eighth Amendment distinction between the Sixth Amendment right announced in *Apprendi* and the Sixth Amendment right applied to capital cases in *Ring* is inconsistent with this Court's reasoning and holdings in both *Apprendi* and *Ring*.

IV. The procedural change required by *Apprendi/Ring* does not fall within either of the *Teague* exceptions.

A. No behavior decriminalized

No punishment-enhancing behavior defined by Arizona's statutory aggravating circumstances was decriminalized by *Ring*.[17]

B. Juries cannot be shown to seriously enhance the accuracy of fact finding at any trial.

Although this Court noted in *Ring* that the question of whether judges are the better fact finders "is far from evident,"[18] one need not look beyond the O.J. Simpson verdict for evidence that juries are equally suspect.

We also cannot allow the 9th Circuit majority's analysis to distract us from the fact that *Apprendi* and *Ring* are Sixth Amendment cases, not Eighth Amendment cases. On this issue, again, the 9th Circuit majority attempts to reapply an Eighth Amendment gloss to capital penalty phase decision making which *Ring* specifically stripped away.[19]

The Sixth Amendment's guarantee of right to jury trial was not motivated by, and its application does not turn upon, the relative *accuracy* of jury fact finding. "The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential

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[17] 341 F.3d at 1109.

[18] 536 U.S. at 607.

[19] 341 F.3d at 1109-1110.

factfinders." *Ring,* 536 U.S. at 607. That said, it is odd indeed for the 9th Circuit majority to make its *Teague* analysis of *Ring* turn upon the highly debatable concept of jurors as remarkably superior fact finders.

It was not enhanced accuracy, but our evolving understanding of the Sixth Amendment's guarantee of trial by jury which produced *Apprendi* and *Ring*. Neither *Apprendi* nor *Ring* assure guilty defendants they will get a more accurate evaluation of the punishment-enhancing behavior in question by a jury. Instead, these defendant's are simply told they cannot be denied their Sixth Amendment right to have a jury consider that question, *if the defendant desires it.*

The 9th Circuit majority simply proffers its opinion, buttressed by nothing in this record, that juries are by far the more accurate fact finders.[20] As the dissent points out, there currently exists no dispositive answer to the jury accuracy question in legal precedent, scholarship or in the minds of the public.[21] Although the motivation of some research on this subject may be suspect, one should not ignore research that argues lay juries are inconsistent and generally confused about their role in complex cases. Some of the research focuses specifically on the inability of juries to understand the instructions presented them in capital cases.[22]

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[20] 341 F.3d at 1109-1110.

[21] 341 F.3d at 1120-1130 (Rawlins, Circuit Judge, dissenting.)

[22] There is little research on the consistency of judicial sentencing. *See* Robin Lutz, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. Colo. L. Rev. 227 (2002). Most of the research focused on the ineffectiveness or inability of juries to understand the instruction. *See* David C. Baldus,

(Continued on following page)

Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 757 (2002); William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 Cornell L. Rev. 1476 (1998); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995); Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017; Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21 (1997); Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 Am U. L. Rev. 1403 (1996); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & Hum. Behav. 575 (1997); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & Hum. Behav. 411 (1994); Patrick E. Higginbotham, *Juries and the Death Penalty* 41 Case W. Res. L. Rev. 1047 (1991); Joseph L. Hoffmann, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311 (2003); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161 (1995); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 L. & Hum. Behav. 203 (1992); Robin Lutz, *Experimenting With Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. Colo. L. Rev. 227 (2002); Michael A. Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. Rev. 283 (1989); Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 Ala. L. Rev. 5 (1994); David A. Scheffel, *Harris v. Alabama – A Portrait of Deference to the States in Capital Punishment*, 19 T. Jefferson L. Rev. 39 (1997); Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 Fla. L. Rev. 475 (2001); Richard L. Wiener, et al., *Comprehensibility of Approved Jury Instruction in Capital Murder Cases*, 80 J. App. Psychol. 455 (1995); Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 Neb. L. Rev. 757 (2002); Richard L.

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C. The interest of the amici states

The interest of these states is to preserve a legitimate latitude in their public policy decision making. Beyond the requirements of our federal constitution exists the realm of legitimate public policy debate and action. We believe that, in situations not governed by the Sixth Amendment, it should be left to the states to determine the respective roles they desire their judiciary and lay jurors to play as fact finders in capital and non-capital trials alike.[23]

V. The risk of *Ring* retroactivity upon presently established law.

A. Is *Apprendi* also retroactive?

Because the erroneous distinctions conjured by the 9th Circuit majority do not effectively distinguish *Ring* from *Apprendi,* the amici states note our concern that if *Ring* is ultimately given retroactive application the uniform body of law presently holding *Apprendi* not to be retroactive[24] must also be in jeopardy. The impact of the reversal of that uniform body of non-capital law would have a much greater disruptive impact upon our state and federal criminal justice systems than would the capital

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Wiener, et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, 28 J. App. Soc. Psychol. 124 (1998).

[23] For example, the State of Nebraska, in response to *Ring,* modified its first degree murder penalty phase process to provide that a jury will determine the existence of alleged statutory aggravating circumstances and a panel of three judges will complete the statutory sentencing analysis if a jury finds a defendant "death eligible". Neb.Rev.Stat. § 29-2519 *et. seq.*

[24] See footnote 6, above.

question currently before us. That result would expose untold numbers of both state and federal cases to what these states believe would be unnecessary re-litigation.

We observe no principled way to distinguish the Sixth Amendment right applied to potential capital cases in *Ring* from the Sixth Amendment right recognized by this court in Apprendi.

B. *Ex post facto* law

The similarities between the language employed by this Court in describing the distinctions between the concepts of "procedural" and "substantive" in the context of the Ex Post Facto Clause will also be called into question if the 9th Circuit majority's holding is upheld.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court found that the retrial of the penalty phase in a potential capital case did not violate the Ex Post Facto Clause even when the Florida Legislature, in response to *Furman v. Georgia*, 408 U.S. 238 (1972), *created* that state's aggravating circumstances between the date of Dobbert's crime and his trial.

In *Dobbert*, this Court classified the legislative *creation* of aggravating circumstances as being procedural in nature, and therefore their application to a crime which preceded their creation did not violate the Ex Post Facto Clause.[25] Yet here the 9th Circuit majority concluded that the application of the *very same* aggravating circumstances that

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[25] 432 U.S. at 293-294.

existed at both the time of the murder and at the time of trial somehow represented a "substantive" change in Arizona law requiring retroactive application of *Ring*. We do not see how the 9th Circuit majority's rationale can be allowed to stand without also exposing nearly thirty years of law under *Dobbert* to question.

As this Court noted in *Collins v. Youngblood*, 497 U.S. 37, 51-52 (1990): "The right to jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause."

VI. A second generation of *Ring* claims are already being litigated in the state courts.

The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final judgments of conviction.[26]

This Court specifically holding *Ring* not to be retroactive would significantly reduce the number and types of

[26] *Goodin v. State*, 2003 WL 21805386, *7 (Miss. 2003) (state postconviction proceeding attempting to raise a *Ring*-based claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Russell v. State*, 849 So.2d 95, 146 (Miss. 2003) (same); *West v. State*, 2003 WL 22220502, *1 (Ala.Crim.App. 2003) (postconviction action alleging indictment against prisoner was fatally defective under *Ring* because it did not identify any aggravating circumstances).

cases in which the state courts should legitimately consider such arguments.

CONCLUSION

The amici states urge this Court to reverse the decision of the 9th Circuit Court of Appeals and specifically hold that this Court's ruling in *Ring* is not to be given retroactive application to final criminal judgments being considered on collateral review.

Respectfully submitted,

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In the Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WARREN WESLEY SUMMERLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Court granted certiorari limited to the following questions:

1. Whether the rule announced by the Court in *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002), is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion).

2. Whether *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings.

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In the Supreme Court of the United States

No. 03-526

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WARREN WESLEY SUMMERLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether the rule of *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002), is retroactively applicable on collateral review of capital sentences. The specific new rule announced in *Ring*—that aggravating circumstances that make a defendant eligible for the death penalty must, under the Sixth Amendment, be found by a jury—has little direct effect on federal capital practice. At the time of *Ring*, the Federal Death Penalty Act already required that juries find those aggravating circumstances. See 18 U.S.C. 3593(b)-(c). The questions presented in this case, however, require the Court to consider more generally the standards governing the availability of new rules in collateral attacks on convictions and sentences. The United States thus has a substantial interest in this case.

STATEMENT

1. On the morning of April 29, 1981, Brenna Bailey, an account investigator for Finance America, left her office to visit respondent's home to speak with respondent's wife about an overdue account. She did not, however, return as scheduled, and her disappearance was reported to the police. Later that evening, police received a tip from a female caller, later identified as respondent's mother-in-law, who stated that respondent had murdered the missing woman from "Pacific Finance," rolled up her body in a carpet, and placed it in the trunk of a car. Pet. App. C2. Early the following morning, Bailey's car was found in a parking lot located approximately one mile from respondent's home. *Ibid.* A pair of panties, pantyhose, and shoes were located on the floor of the car's back seat. *Id.* at A4. Bailey's partially-nude body was found in the trunk, alongside a bloody bedspread. Her skull had been crushed. *Id.* at C2.

Police executed a warrant to search respondent's home, where they found numerous incriminating items. Respondent was arrested after he made incriminating statements and his wife identified the bloody bedspread found with Bailey's body as having come from their household. Respondent made additional incriminating statements at the police station. Pet. App. A4.

2. In 1982, following a jury trial in the Superior Court of Maricopa County, Arizona, respondent was found guilty of first degree murder and sexual assault. Pet. App. C3. State law required the trial judge, sitting alone, to determine the presence or absence, under the reasonable-doubt standard, of aggravating circumstances necessary to impose the death penalty and to weigh those circumstances against any mitigating circumstances calling for leniency. Ariz. Rev. Stat. Ann. § 13-703 (West 1978); *State* v. *Jordan*, 614 P.2d 825, 828 (Ariz.), cert. denied, 449 U.S. 986 (1980). The court found two aggravating circumstances that rendered respondent

eligible for a death sentence: (1) respondent had a prior felony conviction involving the use or threatened use of violence against another person; and (2) respondent committed the murder under especially cruel, heinous, or depraved circumstances by crushing Bailey's skull after raping her and by causing her mental terror. Pet. 3. After finding no mitigating circumstances calling for leniency, the court sentenced respondent to death for the murder and to 28 years of imprisonment for the assault. Pet. App. A13, C3.

3. The Arizona Supreme Court affirmed. *State* v. *Summerlin*, 675 P.2d 686 (1983). On direct appeal, petitioner argued, *inter alia*, that Arizona's death penalty statute violated the Sixth Amendment jury trial guarantee because it required the trial judge to determine the circumstances necessary for imposition of the death penalty. Relying on *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Arizona Supreme Court rejected that argument. *Summerlin*, 675 P.2d at 695.

4. In 1986, respondent filed a petition for federal habeas corpus relief in the United States District Court for the District of Arizona. The court stayed proceedings to allow petitioner to exhaust his claims in state court. Pet. App. C3. Over the next decade, respondent filed several petitions for postconviction relief in the Arizona courts, all of which were denied. After lifting the stay, the district court denied respondent's federal habeas petition. *Id.* at C4. The court rejected petitioner's argument that "the Sixth, Eight[h], and Fourteenth Amendments require a jury determination of [the] aggravating factors" supporting his death sentence, because "[t]he United States Supreme Court rejected this same argument in *Walton* v. *Arizona*, 497 U.S. 639, 647-649 (1990)." *Id.* at C23-C24 (citation omitted).

5. A divided panel of the Ninth Circuit affirmed in part, reversed in part, and remanded. *Summerlin* v. *Stewart*, 267 F.3d 926 (2001). The panel withdrew its opinion, however, after this Court granted the petition for a writ of certiorari in *Ring* v. *Arizona*, 534 U.S. 1103 (2002), to consider whether

Walton should be overruled. *Summerlin* v. *Stewart*, 281 F.3d 836 (9th Cir. 2002)

6. In *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), this Court overruled *Walton* in part and held that the aggravating circumstances that make a defendant eligible for the death penalty under Arizona law "operate as 'the functional equivalent of an element of a greater offense,'" which, under the Sixth Amendment, must be found by a jury. Thereafter, the court of appeals granted respondent a stay to allow him to move the Arizona Supreme Court to recall the mandate in his direct appeal and consider *Ring*'s retroactive application to his conviction. Pet. App. A15. After the Arizona Supreme Court denied the motion, the Ninth Circuit voted to rehear respondent's case en banc. *Summerlin* v. *Stewart*, 310 F.3d 1221 (2002).

a. In an 8-3 decision, the en banc panel reversed the district court's order denying respondent habeas corpus relief with respect to his sentence. Pet. App. A1-A64. After rejecting respondent's claim that his lawyer rendered constitutionally ineffective assistance during the guilt phase of the trial, *id.* at A17-A22, the court concluded that *Ring* applies retroactively to cases on collateral review and requires that respondent's death sentence be vacated. *Id.* at A2. The majority held that the presumption under *Teague* v. *Lane*, 489 U.S. 288 (1989), against the retroactive application of new rules of constitutional procedure to cases on collateral review did not bar respondent's claim, because *Ring* was not a procedural rule. Pet. App. A28-A42. In that respect, the court distinguished the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which it agreed was not retroactive. *Id.* at A40-A41. The court concluded that *Ring* worked a "restructuring of Arizona murder law" and a "redefinition of the separate crime of capital murder." *Id.* at A42. For that reason, the court concluded that the rule announced in *Ring* "is necessarily a 'substantive' rule" whose application on collateral review is not barred by *Teague*. *Ibid.* (citing *Bousley* v. *United States*, 523 U.S. 614, 620 (1998)).

Alternatively, the majority held that insofar as the new rule announced by *Ring* is a procedural rule, it falls within *Teague*'s exception for "watershed rules" that "seriously enhance the accuracy of the proceeding" and "alter our understanding of bedrock procedural elements essential to the fairness of the proceeding." Pet. App. A44 (citing *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990)). The court stated that "there is little doubt that the rule announced in *Ring* will significantly improve the accuracy of capital trials in Arizona," *id.* at A54, because, in the court's view, penalty-phase presentations to judges may be "extremely truncated affairs," *id.* at A46; judges are exposed to "inadmissible evidence," *ibid.*; judges may confront a number of death penalty cases and are "less likely" than juries "to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence," *id.* at A52; and "[j]udges who face election [like those in Arizona] are far more likely to impose the death penalty than * * * juries," *id.* at A52-A53. The court then asserted that *Ring* "establishes bedrock procedural requirements that affect the structure of every penalty-phase hearing in a capital case." *Id.* at A62. A "critical consideration," *id.* at A60, for the court was its view that errors under *Ring* are "structural" errors that are not subject to harmless-error review. See *id.* at A55-A60. The court concluded that its position that *Ring* is "bedrock" is consistent with the position that it had previously taken that *Apprendi* is not. See *id.* at A63.

b. Judge Rawlinson, joined by Judges O'Scannlain and Tallman, dissented. Pet. App. A69-A83. Judge Rawlinson explained that *Ring* did not announce a new "rule of substance." *Id.* at A71. If it had, she added, "*Apprendi* [also] would have been a substantive rather than a procedural ruling," because "the 'hate crime' aggravator in *Apprendi*

operated in the same manner as the death penalty factors in *Walton* to establish a 'greater offense.'" *Id.* at A72. Judge Rawlinson noted that *Ring* "affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt." *Id.* at A75. Instead, *Ring* merely "altered who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings." *Ibid.* (quoting *State* v. *Towery*, 64 P.3d 828, 833 (Ariz. 2003)).

Judge Rawlinson also concluded that the rule adopted by the Court in *Ring* is not a watershed procedural rule subject to retroactive application under *Teague*. Pet. App. A77-A83. She disputed the majority's "facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process," *id.* at A80, citing studies suggesting that many jurors make up their minds about punishment before the penalty phase, often basing their decision on factors such as the quantum of proof of guilt, sympathy and pity, and race. *Id.* at A79-A80. Judge Rawlinson concluded that because "the jury is still out on the question of whether the decision in *Ring* enhances the accuracy of the capital sentencing process," the second *Teague* exception did not apply. *Id.* at A82.

Judge Rawlinson also disagreed with the majority's conclusion that *Ring* alters our understanding of bedrock procedural principles. Pet. App. A82-A83. She explained that, by expressly declining in *Ring* to reach the State's assertion that any Sixth Amendment error was harmless, this Court "strongly implied, if not outright held, that harmless error analysis is * * * applicable to any imposition of the death penalty by a judge rather than a jury." *Id.* at A73; see also *id.* at A82.

SUMMARY OF ARGUMENT

Under the analysis in *Teague* v. *Lane*, 489 U.S. 288 (1989), subject to narrow exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310 (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989) (adopting *Teague* plurality's approach to retroactivity). The rule that this Court announced in *Ring* v. *Arizona*, 536 U.S. 584 (2002), falls squarely within that principle and is not available to respondent on his collateral attack on his criminal conviction. Neither of the court of appeals' reasons for refusing to apply *Teague*'s bar on retroactive application of new rules—that *Ring* announced a "substantive" rule and that its rule is a "bedrock" principle of our system of justice—is correct.

I. The court of appeals mistakenly held that *Teague* does not apply, on the theory that the *Ring* rule is a substantive, not a procedural, rule under *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). *Bousley* held that decisions of this Court narrowing the scope of federal criminal statutes are substantive, not procedural, rules that are not subject to *Teague*. Such decisions are retroactively applicable because they raise the risk that a defendant has been convicted for committing an act that the law in fact does not make criminal.

This Court's decision in *Ring*, like the decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), before it, does not present the risk that underlay the *Bousley* principle of retroactive application of substantive rules. The question of what facts must be proved in order to impose a particular punishment, as in *Bousley*, is a substantive one, but the question of who must be the decisionmaker on a particular fact, or how that decisionmaker should go about deciding the fact, presents a quintessentially procedural issue. Both *Apprendi* and *Ring* concern the latter question; both address

the question of "'who decides,' judge or jury," about the existence of certain facts. *Ring*, 536 U.S. at 605. Indeed, because federal courts do not have the authority to reach authoritative interpretations of the substance of state criminal prohibitions, federal court decisions in state criminal cases are *never* "substantive" decisions that defy *Teague* analysis entirely.

II. Under *Teague*, new rules of constitutional criminal procedure are not retroactively applicable to cases on collateral review unless they satisfy one of two narrow exceptions. First, a new rule is retroactively applicable if it places certain primary conduct beyond the reach of the State to prosecute or represents a categorical prohibition against imposition of a particular punishment. *Ring* does not satisfy that standard. Second, a new rule is retroactively applicable if it is a "watershed rule[] of criminal procedure" that is "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 311, 313. The court of appeals erred in holding that *Ring* announced such a rule.

A. The rule in *Ring* is not "central to an accurate determination of innocence or guilt," since it has long been recognized that accurate findings may be made by judge or jury. Instead, the rationale of *Ring* rests on the need under the Sixth Amendment for "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen." *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That rationale, although important, is not based on the relative accuracy of findings by a judge or jury. Moreover, contrary to the court of appeals' conclusion, the fact that this is a capital proceeding does not alter that result. This Court has long recognized that the ultimate sentencing decision in capital cases may be entrusted solely to the judge. Given that judges may be entrusted with that determination, and with accurately assessing the facts necessary to that determination, it follows *a fortiori* that judges are capable of making the more modest factual

determination under *Ring* of whether the defendant's crime was accompanied by a statutory aggravating factor.

B. In any event, the rule in *Ring* was an application of *Apprendi*. The principle that a defendant has the right to a trial by jury on every essential element of the offense was established long before *Apprendi* or *Ring*. *Apprendi* was essentially a line-drawing decision that developed the standard for determining how to distinguish between facts that must be submitted to a jury and facts that may be decided by the judge. *Ring*, in turn, simply applied *Apprendi* to Arizona's capital sentencing procedure. *Ring* and *Apprendi* are accordingly refinements of long-settled legal principles. Although such refinements may be important, they do not alter our understanding of the "bedrock procedural elements" that are essential to a fair trial.

The court of appeals' primary support for its conclusion that *Ring* announced a "watershed" rule was its view that *Ring* error is "structural" because it is not subject to harmless-error review. The fact that an error is "structural" in that sense, however, does not mean that it is "watershed" under the second *Teague* exception. An error can be both significant and its effect difficult or impossible to determine without leading to the conclusion that the legal rule violated was of "bedrock" proportions. In any event, a *Ring* error, like an *Apprendi* error, is not "structural." Such an error consists merely in the failure to submit a single factual issue to the jury for determination. This Court's cases establish that a failure to submit a single element of an offense to a jury *is* subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1 (1999). Accordingly, the court of appeals' conclusion that *Ring* error is structural—along with its accompanying conclusion that such an error is "watershed" under *Teague*'s second exception—is mistaken.

ARGUMENT

I. *RING* DID NOT ANNOUNCE A SUBSTANTIVE RULE FOR PURPOSES OF *TEAGUE*'S RETROACTIVITY ANALYSIS

A. Substantive Rules That Are Applicable Retroactively Without Regard To *Teague* Are Those That Alter The Scope Of Criminal Liability

1. Under *Teague* v. *Lane*, 489 U.S. 288 (1989), "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310 (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989) (adopting *Teague* plurality's approach to retroactivity). In *Bousley* v. *United States*, 523 U.S. 614 (1998), this Court held that "because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Id.* at 620. Accordingly, non-procedural decisions under *Bousley* may be applied retroactively, notwithstanding *Teague*.

The issue in *Bousley* was whether *Bailey* v. *United States*, 516 U.S. 137 (1995), which had held that "use" of a firearm under 18 U.S.C. 924(c)(1) (1994), required active employment as opposed to mere possession, was retroactively applicable on collateral review. The Court reasoned that *Bailey*, by narrowing the meaning of the term "use," created "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" 523 U.S. at 620 (quoting *Davis* v. *United States*, 417 U.S. 333, 346 (1974)). For that reason, the Court concluded that it would be "inconsistent with the doctrinal underpinnings of habeas review," *id.* at 621, to bar collateral relief based on a decision like *Bailey*—*i.e.*, a holding that "a substantive federal criminal statute does not reach certain conduct." *Id.* at 620.

2. The risk that a person's conviction of an offense rests on a finding that he has committed an act that does not constitute that offense is present when an authoritative decision has narrowed the *substantive* scope of criminal liability. *Bailey*, for example, narrowed the scope of liability because, after *Bailey*, a defendant's mere possession of a gun during and in relation to a drug trafficking offense was not a violation of the statute. In such an instance, the conclusion of the finder of fact and the original reviewing courts that the defendant's conduct was subject to the criminal prohibition enacted by the legislature is no longer trustworthy, because those entities were all acting under a mistaken view of the scope of criminal liability. Accordingly, the *Bousley* principle applies to permit retroactive application of decisions like *Bailey*, which narrowed the understanding of what conduct is punishable under the criminal law. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (narrowing scope of "willfulness" element of 31 U.S.C. 5322); *McNally* v. *United States*, 483 U.S. 350 (1987) (narrowing scope of "scheme or artifice to defraud" element of 18 U.S.C. 1341).

By contrast, the risk that a person's conviction of an offense rests on commission of an act that does not constitute that offense does not arise when a later decision merely clarifies *procedural* rights. In that instance, the later judicial decision has no effect on the criminality of the conduct that the defendant was found to have engaged in. Therefore, *Teague*—and not *Bousley*—continues to prohibit (subject to narrow exceptions) retroactive application of this Court's numerous procedural decisions, which do not alter the scope of criminal liability.

B. *Ring* Did Not Alter The Scope Of Criminal Liability For Any Crime

With respect to the specific rule at issue in this case, it is clear that *Ring*, like *Apprendi* before it, did not alter the substantive scope of criminal liability under applicable state

law. *Ring* is therefore a procedural rule subject to *Teague*. Both before and after *Ring*, a defendant who committed murder with at least one aggravating circumstance was subject to the possibility that he would be sentenced to death under Arizona law. Cf. *Dobbert* v. *Florida*, 432 U.S. 282 (1977) (post-offense death penalty statute providing for increased procedural protections may be applied to earlier committed offense). Like *Apprendi*, *Ring* merely answered the question of who—judge or jury—was to decide the factual question of whether such an aggravating circumstance was present. Because *Ring* did not alter the substantive law governing capital murder in Arizona, but merely placed a constitutional constraint on the identity of the decisionmaker for one element of that offense, *Ring*, like *Apprendi*, is a quintessentially procedural rule subject to *Teague* retroactivity principles.

1. Apprendi *is not a "substantive" rule under* Bousley, *and it is therefore subject to* Teague *retroactivity principles.* In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The defendant in *Apprendi* had been convicted of unlawful possession of a firearm under a New Jersey statute that set a maximum punishment of imprisonment for ten years. A judge, however, had also found that the defendant was eligible under a "hate crime" law for an additional term of imprisonment of ten years because he had acted with a purpose to intimidate an individual because of race. This Court reasoned that the "hate crime" provision increased the statutory maximum sentence that could be imposed on the defendant based on a legislatively specified fact—the defendant's purpose to intimidate because of race. Accordingly, the Court ruled that the increased sentence could not be imposed unless the defendant's purpose to intimidate was submitted to a jury and proved beyond a reasonable doubt.

a. Because the issue in *Apprendi* was "the adequacy of New Jersey's *procedure*," 530 U.S. at 475 (emphasis added), the *Apprendi* rule is not a substantive rule under *Teague*. *Apprendi* did not address whether or how severely a State could or did punish unlawful possession of a firearm accompanied by a purpose to intimidate because of race. Both before and after *Apprendi*, the State of New Jersey remained free to subject a defendant who so possessed a firearm to an enhanced sentence. *Apprendi* simply held that, if New Jersey wants to hinge enhanced statutory maximum penalties on a particular fact, it must do so in accordance with procedures that allow the defendant the opportunity to have the fact proved to a jury beyond a reasonable doubt.

Apprendi therefore announced a procedural, not a substantive, rule. Cf. *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999) (explaining that "[t]he constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment"). It follows under *Teague* that, unless the *Apprendi* rule falls within one of *Teague*'s exceptions, it may not be applied retroactively to cases on collateral review.

b. All of the federal courts of appeals that have considered the issue—including the Ninth Circuit—have held that the *Apprendi* rule is a procedural rule for purposes of *Teague* retroactivity analysis. As the Fifth Circuit explained in considering the application of *Apprendi* to federal drug offenses, *Apprendi* "did not change what the government must prove [to establish a drug offense under 21 U.S.C. 841(a)], only that the jury, rather than the judge must decide the question of drug quantity." *United States* v. *Brown*, 305

F.3d 304, 309 (5th Cir. 2002), cert. denied, 123 S. Ct. 1919 (2003).[1]

2. Ring, *as an application of* Apprendi, *is also subject to* Teague. *In Ring*, the Court applied the Sixth Amendment component of the procedural rule announced in *Apprendi* to Arizona's capital sentencing scheme, in which, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." 536 U.S. at 588. The Court observed in *Ring* that, in *Walton* v. *Arizona*, 497 U.S. 639, 649 (1990), it had upheld "Arizona's sentencing scheme" as "compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.'" 536 U.S. at 588 (quoting *Walton*, 497 U.S. at 649). The Court noted, however, that under Arizona law as announced by the Arizona Supreme Court, "'[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists.'" 536 U.S. at

[1] See *Curtis* v. *United States*, 294 F.3d 841, 843 (7th Cir.) ("*Apprendi* does not alter which facts have what legal significance, let alone suggest that conspiring to distribute [drugs] is no longer a federal crime unless the jury finds that some particular quantity has been sold."), cert. denied, 537 U.S. 976 (2002); see also, *e.g.*, *United States* v. *Swinton*, 333 F.3d 481, 488-489 (3d Cir.), cert. denied, 124 S. Ct. 458 (2003); *Sepulveda* v. *United States*, 330 F.3d 55, 62 (1st Cir. 2003); *Coleman* v. *United States*, 329 F.3d 77, 83-84 (2d Cir.), cert. denied, 124 S. Ct. 840 (2003); *Goode* v. *United States*, 305 F.3d 378 (6th Cir.), cert. denied, 537 U.S. 1096 (2002); *United States* v. *Mora*, 293 F.3d 1213, 1218-1219 (10th Cir.), cert. denied, 537 U.S. 961 (2002); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *McCoy* v. *United States*, 266 F.3d 1245, 1256 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002); *United States* v. *Moss*, 252 F.3d 993, 997-998 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002); *United States* v. *Sanders*, 247 F.3d 139, 147 (4th Cir.), cert. denied, 534 U.S. 1032 (2001).

596 (quoting *State* v. *Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). Because the Arizona statute required the trial court to find facts necessary to increase the defendant's sentence from a term of imprisonment to the death penalty, the Court held that "*Walton*, in relevant part, cannot survive the reasoning of *Apprendi*." *Id.* at 603.

Ring thus simply applied the procedural rule announced in *Apprendi* to the particular circumstances of the Arizona sentencing scheme. Just as in *Apprendi* the Court did not alter whether or how severely the State could punish gun possession accompanied by the specified intent to intimidate, the Court in *Ring* did not alter whether or how severely the State of Arizona could punish murder accompanied by the specified aggravating circumstances. Both before and after *Ring*, the State of Arizona remained free to determine that individuals who commit murder accompanied by an aggravating circumstance may receive the death penalty. The Court in *Ring* simply held that, if Arizona wants to hinge eligibility for the death penalty on the presence of particular aggravating circumstances, it must permit the defendant the opportunity to have the question of whether those circumstances exist decided by the jury, rather than the judge. As the Court explained, "[c]apital defendants, no less than noncapital defendants, * * * are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

The Court itself described the question before it in *Ring* as "'who decides,' judge or jury." 536 U.S. at 605; see also *id.* at 597 ("The question presented is whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee * * * requires that the aggravating factor determination be entrusted to the jury."). That is a procedural question, and the *Teague* bar on retroactive appli-

cation of new procedural rules accordingly applies to the rule announced in *Ring*.[2]

3. *The limits on federal courts' authority support the application of* Teague. Indeed, the fact that *Ring* is a procedural rule subject to *Teague* follows from the fact that it is a federal decision in a state criminal case. In *Bousley* itself, this Court described the decisions that apply retroactively notwithstanding *Teague* as decisions "in which this Court decides the meaning of a *criminal statute enacted by Congress*" or a decision that "a substantive *federal* criminal statute does not reach certain conduct." 523 U.S. at 620 (emphasis added). That limitation of the *Bousley* principle to cases narrowing the scope of federal criminal statutes is appropriate, because federal courts exercise distinctly different authority in federal and state criminal cases.

In federal criminal cases, federal courts have the authority to construe the substantive reach of federal criminal statutes. They occasionally reach decisions that narrow the scope of criminal liability under such statutes, as this Court did in *Bailey*. *Bousley* established that such decisions are "substantive" and not subject to *Teague* analysis.

Federal courts have entirely different authority in reviewing state criminal laws. This Court (like other federal courts) lacks the authority to make substantive changes to state law or to reject an authoritative interpretation of a state criminal statute. See *Ring*, 536 U.S. at 603 ("This

[2] The courts of appeals for the Tenth and Eleventh Circuits and the highest courts of several States have all concluded that *Ring* announced a procedural rule, rather than a substantive rule, for purposes of *Teague*. *Turner* v. *Crosby*, 339 F.3d 1247, 1283-1284 (11th Cir 2003); *Cannon* v. *Mullin*, 297 F.3d 989, 993 (10th Cir. 2002); *State* v. *Lotter*, 664 N.W. 2d 892, 908 (Neb. 2003); *Head* v. *Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State* v. *Towery*, 64 P.3d 828 (Ariz.), cert. dismissed, 124 S. Ct. 44 (2003); *Colwell* v. *State*, 59 P.3d 463, 470-473 (Nev. 2002), cert. denied, 124 S. Ct. 462 (2003); see also *State* v. *Whitfield*, 107 S.W.3d 253, 268-270 (Mo. 2003) (suggesting that *Ring* announced a procedural rule, but declining to adopt *Teague* framework and electing to apply *Ring* retroactively).

Court * * * repeatedly has held that state courts are the ultimate expositors of state law.") (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)). Federal courts may of course invalidate state criminal laws where those laws run afoul of the Constitution. But state criminal laws ordinarily are found to violate the Constitution because they violate one of the procedural requirements of the Constitution—for example, the procedural right to a jury trial embodied in the Sixth Amendment (as made applicable to the States through the Fourteenth Amendment) that is at issue in this case. Decisions holding state criminal laws invalid accordingly are procedural and not substantive, and their retroactivity is governed by *Teague*.

There are some constitutional limitations applicable to state criminal cases that govern the nature of conduct that may be made criminal or that may be subject to certain punishment, such as those in the First Amendment, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), or the Eighth Amendment, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782 (1982). Those limitations were not at issue in *Ring*. But when those limitations are applied in state criminal cases, the result is still not a "substantive" decision under *Bousley*. Instead, the result is a decision placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 311 or "address[ing] a substantive categorical guarante[e] accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990) (citation and internal quotation marks omitted). The retroactivity of such decisions is determined under the first *Teague* exception. Accordingly, the category of "substantive" decisions not subject to *Teague* at all is limited to federal court decisions narrowing the scope of federal criminal statutes. *Ring* involved a state criminal statute,

and its retroactivity accordingly must be analyzed under *Teague*.

C. The Court Of Appeals' Bases For Finding *Ring* To Be Substantive Are Unsound

The court of appeals conceded that "[i]n one sense, *Ring*—like *Apprendi*—announced a procedural rule: *Ring* mandated that a jury, rather than a judge, must find aggravating circumstances in a capital case." Pet. App. A31. The court noted that "*Ring*'s holding thus addressed, at least in part, the procedure by which any capital trial must be conducted." *Ibid.* Thus far, the court of appeals was correct. The court went on, however, to hold that *Ring* nevertheless announced a substantive rule. None of the court's reasons for reaching that further conclusion is sound.

1. The court of appeals believed that *Ring* was "[m]ore than a procedural holding" because it "effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment." Pet. App. A32.[3] That is mistaken. This Court did not—and, indeed, had no authority to—"redefin[e] Arizona capital murder law" in *Ring*. The Court in *Ring* instead held unconstitutional the assignment, under Arizona's then-current capital murder sentencing scheme, of the task of determining whether an aggravating circumstance was present to the judge, rather than the jury. After *Ring*, Arizona remained free to impose the death penalty on the same substantive basis as before—*i.e.*, where, as a necessary pre-

[3] See also Pet. App. A37 ("[W]hen *Ring* overruled *Walton*, * * * it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally."); *id.* at A40 (*Ring* "restructured Arizona law and it redefined, as a substantive matter, how that law operates.").

condition, the murder was accompanied by an aggravating circumstance.

2. The court of appeals also believed that *Ring* announced a substantive rule because *Ring* involved a "determination of the meaning of a criminal statute" and it "address[ed] the criminal significance of certain facts." Pet. App. A40 (internal quotation marks omitted). Procedural rights, in criminal law as elsewhere, may frequently turn on the nature or provisions of the substantive law at issue in a case, and the adjudication of procedural rights accordingly may depend on a construction of the civil or criminal statute. See, *e.g.*, *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542-543 (1989) (right to jury trial only for "serious" offenses); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60 (1999) (procedural due process rights depend on existence of property interest). Thus, this Court in *Ring* and in *Apprendi* had to determine the meaning of the criminal statutes at issue, in order to determine which facts "increase[d] the penalty * * * beyond the prescribed statutory maximum" and therefore had to be submitted to the jury. *Apprendi*, 530 U.S. at 490. That has nothing to do, however, with whether those decisions were substantive. The only reason that the Court construed the scope of the state statutes in either case was in order to determine a procedural question—which facts could be decided by the judge or, instead, had to be submitted to the jury.

3. Finally, the efforts of the court of appeals to distinguish *Apprendi*, which the court accepted as announcing a procedural rule, from *Ring*, which the court viewed as announcing a "substantive" rule not subject to *Teague*, were mistaken. As the court of appeals noted, this Court in *Apprendi* had stated that "[t]he substantive basis for New Jersey's enhancement [was] not at issue." Pet. App. A40 (quoting 530 U.S. at 475). The same point, however, was true in *Ring*. This Court in *Ring* did not suggest that there was any legal defect in Arizona's aggravating circumstances,

or that Arizona could not hinge eligibility for the death penalty on the presence of at least one of those circumstances. The only point at issue in *Ring* was precisely the same point at issue in *Apprendi*—whether the defendant was entitled to have the "substantive basis" for the increased punishment submitted to the jury, rather than decided by the judge. The court of appeals conceded that this Court's decision in *Apprendi* was "procedural." This Court's decision in *Ring* was "procedural" for precisely the same reasons.[4]

II. RING DOES NOT FALL WITHIN TEAGUE'S NARROW EXCEPTION FOR "WATERSHED" RULES OF CRIMINAL PROCEDURE

Under the *Teague* framework, new constitutional rules of criminal procedure are not retroactively applicable to proceedings on collateral review. That is because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. Nonetheless, if a new rule satisfies one of two exceptions, society's interest in finality can legitimately be subordinated to the defendant's interest in relitigating his claim. The first exception permits retroactive application of new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971)). The court of appeals correctly concluded that

[4] The court of appeals also erred in attempting to distinguish *Ring* from the procedural rule announced in *Apprendi* on the ground that, "[u]nlike the result in *Ring*, *Apprendi* did not cause the relevant statute to be declared unconstitutional." Pet. App. A63. Just as *Ring* invalidated Arizona's death penalty procedures, *Apprendi* invalidated the procedures used in New Jersey to impose the hate crime enhancement—procedures that the New Jersey Supreme Court had authoritatively interpreted to allow the trial judge alone to sentence the defendant above the otherwise applicable statutory maximum verdict. See *Apprendi*, 530 U.S. at 473.

Ring does not fall within that exception. Pet. App. A44. The second exception allows retroactive application of "watershed rules of criminal procedure" that implicate the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311-313. The court of appeals erred in holding (Pet. App. A44-A63) that the rule announced in *Ring* falls within that exception.

This Court has made clear that "[t]o fall within [the second *Teague*] exception, a new rule must meet two requirements: [i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Tyler* v. *Cain*, 533 U.S. 656, 665 (2001) (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). There has been no sufficient showing that the rule in *Ring* satisfies the first, "accuracy" element. Nor is the rule in *Ring*, applying the Sixth Amendment's jury trial right to a particular circumstance, one of "a small core of rules," *Graham* v. *Collins*, 506 U.S. 461, 478 (1993), that mark a "groundbreaking occurrence," *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994), in our understanding of what constitutes a fair trial. Accordingly, the rule in *Ring* does not fall within the second *Teague* exception.

A. Infringement Of The Rule In *Ring* Does Not Seriously Diminish The Likelihood Of Obtaining An Accurate Determination

1. Ring *was not based on the rationale that jury findings are more accurate than findings by a court.* The court of appeals concluded that the rule in *Ring* "enhances the accuracy of the determination of capital murder in Arizona." Pet. App. A45. Although the rule in *Ring* was based on the Sixth Amendment, the Court made clear in *Ring* itself that the "Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential

factfinders." 536 U.S. at 607. The right to jury trial is instead based on the interest in having "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," *Williams* v. *Florida*, 399 U.S. 78, 100 (1970), thereby "guard[ing] against a spirit of oppression and tyranny on the part of rulers," *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 541 & n.2 (4th ed. 1873)). As a general matter, therefore, the jury-trial right is not based on a particular view on whether juries or judges are more likely to determine facts accurately.

Indeed, it has long been accepted that judges are able to make accurate factual determinations in criminal cases, both in deciding non-jury questions, see, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690 (1996) (probable cause and reasonable suspicion under Fourth Amendment); *Bourjaily* v. *United States*, 483 U.S. 171, 176 (1987) (existence and scope of conspiracy under Federal Rule of Evidence 801(d)(2)); *Nix* v. *Williams*, 467 U.S. 431, 444-445 n.5 (1984) (inevitable discovery rule), and in conducting bench trials, see *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968). A determination of the presence of an aggravating factor is in itself no different from a determination of the presence of any other fact in the case. There is no reason why a judge cannot be an accurate decisionmaker on any such fact.

2. *Courts may make accurate factual findings in capital cases, as in other cases.* The fact that the aggravating factor in this case was essential to imposition of a capital sentence does not alter that conclusion. To the contrary, even with respect to the ultimate question whether to sentence a defendant to death, this Court has made clear that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," without any participation by the jury. *Harris* v. *Alabama*, 513 U.S. 504, 515 (1995); see *McCleskey* v. *Kemp*, 481 U.S. 279, 303-304 n.25 (1987); *Spaziano* v. *Florida*, 468 U.S. 447, 457-465 (1984). If a judge may make a sufficiently accurate determination on that ultimate question and on the subsidiary facts on which it may turn, it follows *a fortiori* that a judge may reach an accurate determination of the existence of a particular fact in a capital case, such as the presence of an aggravating circumstance.

The court of appeals observed that factual presentations to a judge "are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda" and the court may "receive an inordinate amount of inadmissible evidence." Pet. App. A46. Those observations, however, have nothing to do with whether *Ring* enhances the accuracy of capital sentencing proceedings. *Ring* did not impose requirements on the structure and length of capital sentencing hearings or set standards for the admissibility of evidence in such proceedings, and the rationale and applicability of *Ring* had nothing to do with the desirability of any such limitations.

The court of appeals also believed that "[a] second primary accuracy-enhancing role of a jury in capital cases is to make the important moral decisions inherent in rendering a capital verdict." Pet. App. A50. As noted above, however, this Court has held, in decisions not called into question by *Ring*, that the Constitution permits the ultimate decision about punishment in a capital case to be made by the court, without participation by the jury. That ultimate decision is far more a product of "moral decisions" than the factual question whether an aggravating circumstance was present. The court of appeals' conclusion that judges cannot render sufficiently accurate capital sentencing decisions is mistaken.

B. *Ring* Did Not Announce A "Bedrock" Or "Watershed" Rule

Even aside from whether the pre-*Ring* procedure in Arizona "seriously diminish[ed] the likelihood of obtaining an accurate conviction," *Ring* did not "alter our understanding

of the *bedrock procedural elements* essential to" a fair trial. See *Tyler*, 533 U.S. at 665 (citations and internal quotation marks omitted). The Court has identified the rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as the best example of such a rule. See *Saffle*, 494 U.S. at 495; see also *Mackey*, 401 U.S. at 694 (Harlan, J., concurring). Before *Gideon*, it was thought that an indigent defendant charged with a felony offense could in some cases receive a fair trial without the opportunity for assistance of appointed counsel. In *Gideon*, the Court repudiated that notion when it recognized that, absent a waiver of counsel, a felony trial conducted without a defense lawyer was an inherently unfair vehicle for adjudicating the defendant's guilt or innocence. In that way, *Gideon* altered our understanding of the universe of procedures that are indispensable to a fair trial; it added the right to appointed counsel to that core set of rules that define an American criminal trial.

Beyond *Gideon*, the Court has noted that rules within the second *Teague* exception "are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313 (plurality opinion; citation and internal quotation marks omitted). The exception "is clearly meant to apply only to a small core of rules" that have the "primacy and centrality" of those examples. *Graham*, 506 U.S. at 478. Because the "premise" of the second *Teague* exception is "that such procedures would be so central to an accurate determination of innocence or guilt," the Court has concluded that it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. The rules in *Apprendi* and in *Ring*, which involve applications of the long-settled general principle that a defendant is entitled to

have the essential elements of his offense submitted to a jury, do not fit within the exception.

1. Apprendi *and* Ring *were refinements of pre-existing principles.* *Apprendi* announced the rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum (other than the fact of a prior conviction) must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 490. Before *Apprendi*, the Court had made clear that the Due Process Clause of the Fifth Amendment and jury trial guarantee of the Sixth Amendment required a jury finding on all essential elements of an offense. See, *e.g.*, *Sullivan* v. *Lousiana*, 508 U.S. 275, 277-278 (1993) (citing cases); *United States* v. *Gaudin*, 515 U.S. at 510. Indeed, the fundamental importance of the jury trial right in criminal cases was well established. See *Duncan* v. *Louisiana*, 391 U.S. at 148-154. *Apprendi*'s contribution was not to announce a new "watershed" rule, but to clarify precisely which facts that enhance punishment must be submitted to the jury and which facts need not be—an issue that had previously been the subject of finely graduated distinctions. Compare *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), with *Patterson* v. *New York*, 432 U.S. 197 (1977). Such line-drawing decisions may be of substantial importance, but they are not the kind of "groundbreaking" decisions, *Caspari* v. *Bohlen*, 510 U.S. at 396, comparable to *Gideon* v. *Wainwright*, that "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242 (quoting *Teague*, 489 U.S. at 311).

It follows *a fortiori* that *Ring* did not announce a new bedrock rule. *Ring* did not alter the substantive standard announced in *Apprendi* for determining which facts must be submitted to the jury, but simply applied the *Apprendi* rule to Arizona's capital sentencing statute. The rule applied in *Ring* was that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a

fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 536 U.S. at 602. In announcing that rule, the Court cited *Apprendi*, and the Court's statement of the rule is a paraphrase of the rule announced in *Apprendi*. See 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Cases such as *Ring*, which apply general legal principles to particular circumstances, are not "watershed rules" that come within *Teague*'s second exception.[5]

2. *The court of appeals erred in concluding that* Ring *errors are retroactively applicable because they are "structural."* The court of appeals drew support for its conclusion that *Ring* stated a "watershed" rule from its view that a *Ring* error is a "structural" error that requires reversal on direct review without any consideration of whether the error was harmless in the particular case. Pet. App. A55-A60. In the court's view, "structural error indisputably arises" in cases of *Ring* error, *id.* at A58, and that fact is a "critical consideration in determining whether the second *Teague* exception has been satisfied." *Id.* at A60.

a. The fact that an error is "structural" and not subject to harmless error review does not establish that it satisfies the second *Teague* exception. To the contrary, "[c]lassifying an error as structural does not necessarily alter our understanding of the[] bedrock procedural elements" under the *Teague* exception, "[n]or can it be said that all new rules relating to due process (or even the 'fundamental requirements of due process') alter such understanding." *Tyler*, 533 U.S. at 666-667 n.7 (citation omitted). An error qualifies as "structural" when it is impossible to determine the effect of the error on the jury's verdict, see *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991) , and the error "infect[s] the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). Even if *Ring* error were "structural" in that sense, however, it would not establish that *Ring* was a "watershed" decision. A decision holding that a given element must be entrusted to the jury does not have the "primacy and centrality" of the *Gideon* rule, and it would not "necessarily alter our understanding of the bedrock procedural elements essential to" a fair trial under *Teague*.

b. In any event, the court of appeals erred in classifying *Ring* error as "structural." This Court has made clear that "most constitutional errors can be harmless," *Neder* v. *United States*, 527 U.S. 1, 8 (1999), and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a complete denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), the Court held that a defective reasonable doubt instruction is "structural," because that instruction "'vitiates *all* the jury's findings' and produces 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281-282). In *Neder*, however, the Court held that a failure to submit an element of the offense to the jury was not a structural error. The Court held that "where a reviewing court concludes beyond a reasonable doubt that [an] omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have

[5] Likewise, neither *Apprendi* nor *Ring* made a fundamental change by requiring "that guilt of a criminal charge be established by proof beyond a reasonable doubt"; that principle "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970). *Apprendi* involved an *application* of that bedrock principle to penalty-enhancing facts; the rule it articulated is not one of watershed proportions precisely because it applied that principle and did not announce it. Neither *Ring* nor this case directly implicates the *Winship* rule, because under Arizona law before *Ring*, the judge made the determination of the existence of aggravating factors using the reasonable doubt standard. See *State* v. *Jordan*, 614 P.2d 825, 828 (Ariz. 1980), cert. denied, 449 U.S. 986 (1980).

been the same absent the error, [an] erroneous instruction [omitting the element] is properly found to be harmless." 527 U.S. at 17.

Error under *Apprendi* or *Ring* is essentially the same as the error in *Neder* and differs from the error in *Sullivan*. While the error in *Sullivan* infected *all* of the jury's findings, the errors in *Neder*, *Apprendi*, and *Ring* involved the mistaken submission of a *single* fact that should have been decided by the jury to a judge instead.[6] An appellate court may review an *Apprendi* or *Ring* error for harmlessness in the same way as a court would review the error in *Neder*: "a court, in typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the" penalty-enhancing fact found by the court beyond a reasonable doubt at sentencing. 527 U.S. at 19.[7]

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[6] Relying on *Neder*, the courts of appeals—including the Ninth Circuit itself—have uniformly and correctly rejected the argument that *Apprendi* errors are "structural" and have applied harmless-error analysis to *Apprendi* claims. See, *e.g.*, *Coleman*, 329 F.3d at 89-90; *United States* v. *Mackins*, 315 F.3d 399, 408-409 (4th Cir.), cert. denied, 123 S. Ct. 2099 (2003); *United States* v. *Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), cert. denied, 123 S. Ct. 1604 (2003); *United States* v. *Stewart*, 306 F.3d 295, 321 (6th Cir. 2002), cert. denied, 537 U.S. 1138 (2003); *Sanchez-Cervantes*, 282 F.3d at 670; *United States* v. *Clinton*, 256 F.3d 311, 315-316 (5th Cir.), cert. denied, 534 U.S. 1008 (2001); *United States* v. *Candelario*, 240 F.3d 1300, 1307 (11th Cir.), cert. denied, 533 U.S. 922 (2001); *United States* v. *Terry*, 240 F.3d 65, 74-75 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *White*, 240 F.3d 127, 133-134 (2d Cir. 2001), cert. denied, 124 S. Ct. 157 (2003); *United States* v. *Anderson*, 236 F.3d 427, 429 (8th Cir. 2001), cert. denied, 534 U.S. 956 (2001); *United States* v. *Nance*, 236 F.3d 820, 823-825 (7th Cir. 2000), cert. denied, 534 U.S. 832 (2001).

[7] On remand from this Court's decision in *Ring*, the Arizona Supreme Court held that error under *Ring* is susceptible to harmless-error review. *State* v. *Ring*, 65 P.3d 915, 936 (Ariz. 2003). The court then had no difficulty applying that analysis in concluding that the failure to submit the aggravator at issue in *Ring* to the jury was not harmless and the sentence thus had to be reversed. *State* v. *Ring*, 76 P.3d 421, 423 (Ariz. 2003).

The court of appeals' failure to follow *Neder* resulted from its misapprehension of the nature of the error in this case. The court of appeals stated that "[h]ere, as in *Sullivan*, there was no jury verdict within the meaning of the Sixth Amendment" and the court characterized the error in this case as "[a] complete deprivation of the right to a jury." Pet. App. A56. See *id.* at A59 n.20 ("There is a vast difference between not submitting the element of materiality to the jury for decision [in *Neder*] and having no jury decision at all [in this case].") In the instant case, however, all of the elements necessary to support respondent's guilt of a crime subject to the death penalty were found by a jury beyond a reasonable doubt, with the single exception of the presence of an aggravating circumstance. Accordingly, there was no "complete deprivation of the right to a jury" in this case, and harmless-error review is applicable under the rule of *Neder*.[8]

3. *The court of appeals' other rationales are mistaken.* Beyond its attempt to draw support from its mistaken holding that harmless-error review is inapplicable to *Ring* errors, the court of appeals offered little additional basis for its conclusion that *Ring* error falls within the *Teague* exception for "watershed" rules. See Pet. App. A61-A63. The court repeatedly stated that the *Ring* rule "affects the structure of every capital trial," *id.* at A60; see *id.* at A62, but the court itself conceded that only a limited number of States had enacted schemes that entrusted aggravating-circumstance

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[8] The other decisions relied on by the court of appeals (Pet. App. A57-A58) in support of its conclusion that error under *Ring* is structural error are inapposite. Both *Nguyen* v. *United States*, 123 S. Ct. 2130 (2003) (rendering of appellate judgments by panels that included non-Article III judges), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (delegation of Article III authority to non-Article III judges), involved improperly constituted courts. Neither case involved the issue in *Neder*, *Apprendi*, or this case, which concerns the review of incomplete jury findings in proceedings before a properly constituted court.

determinations to the judge and were therefore subject to *Ring*. See *ibid.* Although the *Ring* rule does implicate the "fundamental right" to a jury trial under the Sixth Amendment, see *id.* at A62, the same can be said of *every* decision of this Court defining the content of that right and applying it to particular circumstances. If the fact that a decision of this Court interprets and applies a "fundamental right" were sufficient to make that decision "bedrock" or "watershed" under the second *Teague* exception, then the exception would swallow the rule, and this Court's frequent refusals to hold that the exception applies would be mistaken.[9] This Court has consistently rejected that kind of broad construction of the second *Teague* exception, and it should do so again in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[9] See *O'Dell* v. *Netherland*, 521 U.S. 151, 167 (1997); *Lambrix* v. *Singletary*, 520 U.S. 518, 539-540 (1997); *Gray* v. *Netherland*, 518 U.S. 152, 170 (1996); *Goeke* v. *Branch*, 514 U.S. 115, 120-121 (1995) (per curiam); *Caspari* v. *Bohlen*, 510 U.S. at 396; *Gilmore* v. *Taylor*, 508 U.S. 333, 345-346 (1993); *Graham* v. *Collins*, 506 U.S. at 478; *Sawyer* v. *Smith*, 497 U.S. at 241-245; *Saffle* v. *Parks*, 494 U.S. at 495; *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990); *Teague* v. *Lane*, 489 U.S. at 314-315 (plurality opinion).

(12)

No. 03-526

IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* MURDER VICTIMS' FAMILIES FOR RECONCILIATION, MS. SUSAN HILL, AND MS. SALLY SCHAUBLE IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICI CURIAE* INTERESTS

Murder Victims' Families for Reconciliation ("MVFR") is a victim-founded, victim-staffed national organization of family members of murder victims who oppose the death penalty. MVFR supports programs that address the needs of victims of violence, enabling them to heal and rebuild their lives. MVFR also advocates for programs and policies that reduce the rate of homicide and promote crime prevention and alternatives to violence. MVFR works to ensure that its members, notwithstanding their opposition to the death penalty, be treated with equal fairness, dignity, and respect under the victims' rights laws and constitutions of the states. MVFR is a member organization of the National Organization for Victim Assistance ("NOVA") and the National Center for Victims of Crime ("NCVC"), and its members are active in Parents of Murdered Children ("POMC") and the National Crime Victims Law Institute ("NCVLI"). MVFR members reside in every state, including those that will be impacted by the decision in this case.

MVFR seeks to provide the court with the perspective of murder victims' survivors who believe that a judicial ruling on the retroactive application of the Sixth Amendment principles announced in *Ring v. Arizona*, 536 U.S. 584 (2002), does not have a direct bearing on the ability of survivors to heal and rebuild their lives.[1]

Susan Hill's father and stepmother were shot in their home in Yuma, Arizona during a home invasion. Her

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[1] Murder Victims' Families for Reconciliation files this brief with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with this Court. Counsel for Murder Victims' Families for Reconciliation authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Murder Victims' Families for Reconciliation and its members made monetary contribution to the preparation or submission of this brief. This brief is authored by two MVFR members who are themselves family members of murder victims.

stepmother was killed and her father was handicapped as a result of the attack. Their attackers, Fred Robinson, Jimmy Lee Mathers, and Theodore Washington, were each convicted and sentenced to death for the crime.[2] One of the attackers, Mathers, was acquitted on appeal. Robinson and Washington are on death row in Arizona. Robinson was Ms. Hill's ex-husband; he had physically and emotionally abused her and, twice, after she left him, kidnapped her and forced her to return to his home. Ms. Hill is an MVFR member and, as a victim under the Arizona Constitution[3] and Arizona state law,[4] has an interest in the outcome of this case.

Sally Schauble's mother, Jacqueline Appelhans, and Dean Morrison were shot to death after being forced to lie face down on the floor of their home during a robbery. Their attackers, Robert and Roger Murray, were convicted and sentenced to death.[5] The Murrays are currently on death row in Arizona. Ms. Schauble is an MVFR member and, as a victim under the Arizona Constitution and Arizona state law, has an interest in the outcome of this case.

Amici support Respondent in his effort to ensure that those who were sentenced to death pre-*Ring* are afforded their full constitutional rights.

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[2] *See State v. Robinson*, 796 P.2d 853 (Ariz.1990).

[3] ARIZ. CONST. art. II, ¢ 2.1 (c). "Victim" means a person against whom the criminal offense has been committed or if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused. MVFR's own definition is family members of victims of homicide.

[4] Ariz. Rev. Stat. Ann. ¢ 13-4401, *et seq.*

[5] *See State v. Murray*, 906 P.2d 542 (Ariz. 1995).

INTRODUCTION AND SUMMARY OF ARGUMENT

The impact of a murder on the victim's family is immeasurable. The victims' rights laws of the states are essential in helping to ensure that murder victims' survivors are provided information, treated with respect, and allowed to have limited inclusion in the criminal justice process. But survivors do not have a "right" to have a certain sentence given or upheld. The Court has not been asked to determine whether state constitutional rights for victims are a compelling state interest which require limiting a defendant's constitutional rights.

The constitutional principles that this Court has held must govern sentencing proceedings in capital cases should be applied retroactively, unless there is a compelling governmental interest that justifies carrying out death sentences that were imposed by procedures now recognized to be unconstitutional. It is not possible to conclude that all, or even a majority of, survivors of murder victims have a compelling need to see such death sentences carried out.

The surviving family members of murder victims have a variety of different needs with respect to the emotional, physical, and economic harm they have suffered as a result of their violent losses. Moreover, they have diverse beliefs about the moral and legal legitimacy of the death penalty. It is impossible to say how all survivors would feel by the overturning of the death sentences that were handed down under an unconstitutional sentencing scheme. The Victims' families represented by this brief believe that constitutional guarantees should extend to those convicted defendants now on death row.

The process of healing that victims' families go through is not analogous to, and does not depend upon, the concept of finality that is a jurisprudential consideration for the court system. The process of recovery for the majority of survivors of murder victims must take place largely independent of any legal judgment or penalty. "Closure" is neither a legal notion nor even an adequate psychological notion. The process

of reconciling oneself to the reality of the violent loss of a family member is a complex and highly individualized process that cannot be addressed by proceedings in the criminal justice system. Furthermore, there is a paucity of empirical evidence about what effects executions actually have on this process.

Moreover, when punishment becomes the primary focus of discussions about "closure," there is a risk that an ostensible concern for victims' rights may become a cloak for advancing policy arguments that favor prosecution goals. Any such exploitation of victims' rights would render suspect the argument for the imposition of the death penalty in a given class of cases based on the supposed benefit of closure or resolution for survivors.

ARGUMENT

I. SURVIVORS OF MURDER VICTIMS ARE NOT ENTITLED TO A FINALITY TO JUDICIAL PROCEEDINGS THAT COMES AT THE EXPENSE OF CONSTITUTIONAL FAIRNESS.

Members of MVFR have been forced to learn that, following a murder, surviving family members must deal both with the loss of a family member and with the criminal justice process.[6] MVFR members, through personal experience, understand the difficulties of having to navigate the criminal justice system during the years in which their grief at the loss of a loved one is at its greatest. They know the anger, hurt, and desperation that family members feel after a murder, and that holding the killer accountable for his or her acts gives surviving family members a needed sense of safety, and

[6] See http://www.mvfr.org/index.jsp; quotation from Marie Deans, founder of MVFR. *"After a murder, victims' families face two things: a death and a crime. At these times, families need help to cope with their grief and loss, and support to heal their hearts and rebuild their lives."*

the feeling that the murder has been acknowledged by society, that the victim mattered, and that the act will not go unpunished.

Most survivors of murder victims come to understand that in murder cases the criminal justice system is slow and can be frustrating and feel unbalanced. To alleviate some of the potential for pain and frustration, it is important to keep survivors informed of the status of a case, to treat them with dignity and respect, and, when appropriate, to allow them to be heard in predetermined legal ways. The laws defining victims' rights within the states protect these interests of survivors and other crime victims.

Yet as significant as the interests of murder victims' survivors may be, they cannot be defining with respect to criminal procedures that are constitutionally mandated.[7] No victims' rights law guarantees a victim any "right" to a given sentence.[8] NOVA amici[9] mistakenly conclude that in determining whether *Ring* should be applied retroactively, it is necessary to "balance the rights of the

[7] *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (Court notes that interests of crime victims cannot be ignored, but underlines that, "Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less."). *See, also, State ex rel. Romley v. Superior Court of Maricopa County*, 836 P.2d 445, 449 (1992) (holding that when a victim's state-based rights come into conflict with a defendant's due process rights under the U.S. Constitution, the Constitutional rights are superior).

[8] *See e.g., State v. Lamberton*, 899 P.2d 939, 941-42 (1995)(holding that while the Arizona victims' rights laws and constitutional amendment give victims the right to participate and be notified of certain proceedings, they do not have the right to control the proceedings or to be parties to the proceedings.)

[9] For the sake of convenience we refer to the four victims' organizations that filed a brief in support of the position of the state in this case as the "NOVA brief."

defendants against the rights of the victims."[10] To speak about victims' rights with respect to the issue at hand is not accurate. The state properly may be concerned about the impact of criminal proceedings on victims. If such concerns are of sufficient magnitude as to constitute compelling state interests, they may be considered in determining whether it is necessary to limit the reach of a defendant's constitutional rights in certain instances.

The Sixth Amendment rights recognized by this Court in *Ring* are fundamental rights. In determining whether they must be given retroactive application, this Court must consider whether the state asserts a compelling interest that requires enforcing a sentence of death that was imposed by procedures the Court now recognizes were unconstitutional.[11] The asserted state interest here is in the finality of judicial proceedings. This Court must decide whether obtaining "the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) counsels against applying *Ring* retroactively in this case. There are substantial reasons to question whether the concern with finality that arises in ordinary criminal cases is appropriate in capital cases. The need to secure a fair and just outcome takes on a particular urgency where life hangs in the balance.

The NOVA amici proceed on the basis that murder victims' survivors have an interest in a final outcome that goes beyond the societal interest in finality. They build their argument by generalizing about what survivors need in order to heal from the emotional harm caused by the murder of a loved one. The generalizations made by the NOVA amici are

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[10] NOVA brief at 20.

[11] *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. Cal. L. Rev. 1019 (1987)(analyzing the appropriate formulation of the balancing that should govern criminal procedure issues).

unsupported by any empirical research and contradicted by the experience of MVFR members and other survivors.

The process of grieving and recovery is highly individualized and it is not possible to make meaningful generalizations about the needs of all survivors of murder victims. Susan Bandes has noted that, "Assertions about what victims need are often presented as if they are empirically based. If this is indeed an empirical question about what conditions are most likely to help, we ought to be looking for empirical answers, and there are surprisingly few out there."[12] She notes that what little empirical evidence does exist "supports the intuitively obvious view that different victims have different needs, and that an individual victim's needs may change over time."[13]

Moreover, the NOVA amici have no basis for assuming that all, or even a majority, of survivors desire a resolution of criminal proceedings that comes at the expense of constitutional fairness. As Margaret Vandiver has noted, "[F]amilies of homicide victims differ widely on how they think offenders should be punished, and sometimes members of the same family, or families victimized by the same defendant, may disagree on the proper punishment."[14]

It is not possible to articulate a state interest sufficient to overcome the application of constitutional rights on the basis of general assumptions about the needs or desires of murder victims' survivors with respect to the death penalty. The argument that survivors as a class have a compelling interest against the retroactive application of *Ring* is far too speculative.

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[12] Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L.J. 1599, 1602 (2000).

[13] *Id.*, at 1602-1603.

[14] Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in Acker, Bohm and Lanier, *America's Experiment with Capital Punishment*, 477, 497 (1998).

There is no inherent benefit that flows to such survivors from carrying out death sentences imposed under a sentencing scheme that was unconstitutional.

II. IT IS AN ABUSE OF THE CONCEPT OF FINALITY IN THE CRIMINAL PROCESS TO TREAT IT AS A PROXY OR A PRECONDITION FOR THE HEALING AND RECOVERY THAT FAMILY MEMBERS OF MURDER VICTIMS NEED.

NOVA amici have conflated the concepts of finality in the criminal process and the "resolution" of emotional issues by the survivors of murder victims. Finality, however, is a jurisprudential concept that does not translate to the process of grieving. The NOVA amici argue that the survivors of murder victims need "reasonable resolution" and that applying *Ring* retroactively would "eliminate any sense of resolution."[15] This argument falsely implies that there is "closure" or "resolution" for grief. For many survivors, the concept of "closure" does not reflect an attainable goal. Many survivors succeed, at best, in reconciling themselves to the fact of the murder.[16]

The process of recovery for the majority of survivors of murder victims must take place largely independent of any legal judgment or penalty. The death penalty in particular, because it is sought in a very small percent of all murder cases, is not relevant to most survivors. In the year 2000, there were 15,517 murders reported to the police, leading to the arrest of 11,997 people, of

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[15] NOVA brief at 5.

[16] See www.MVFR.org for definition of reconciliation within this context. The term "reconciliation" as used by Murder Victims' Families for Reconciliation refers to the idea of reconciling oneself to what has happened. As our brochure states, it means accepting that you cannot undo the murder but you *can* decide how you will respond and how you will go forward in your own life.

whom 8,600 were convicted.[17] The sentence of death was imposed in approximately 2% of those 8,600 convictions, while another 23% received a life sentence, and 75% received a term of years or probation.[18] These statistics make it plain that for the vast majority of survivors of murder victims, their healing takes place without the imposition of the death penalty. At most, what happens to the killer within the criminal justice process is only part of a survivor's process of trying to accept the violent loss of a family member.

Susan Herman, Director of the National Center for Victims of Crime, speaks of the need to create a "parallel justice," one that helps victims separate healing from the criminal justice process.[19] Recognizing that a large portion of criminal victimization goes unsolved or without a conviction, she emphasizes that "When we consider justice for victims, we must always begin and end by asking what victims need to rebuild their lives.... We should not start with the criminal justice system as our point of reference."[20]

Similarly, Susan Bandes has emphasized that we must "be careful to distinguish the question of what victims need from the question of what the legal system ought to provide."[21] She explains:

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[17] U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, "Felony Sentences in State Courts, 2000," June, 2003 at 5, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf (last visited February 17, 2004.)

[18] *Id.* at 4.

[19] *See* National Center for Victims of Crimes. "Parallel Justice Project Launched." Released October 30, 2003. http://www.ncvc.org/press/releases/10302003.html.

[20] *See* Susan Herman "Victim Advocacy and Parallel Justice." *NETWORKS*, Vol. 15 No.3, p. 9. National Center for Victims of Crime, Summer 2000.

[21] Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 Fordham Urb. L.J. 1599, 1605 (2000).

> Some of what individual victims or survivors need to attain closure must come from psychological, religious and social support systems. Such systems have greater ability to individuate among victims and to accommodate the shifting and complex needs of particular victims. They are not obligated to reach a fixed and categorical judgment, or any legal judgment at all. Moreover, they are not obligated to weigh a host of other factors against the victim's needs, including the rights of the defendant and the good of society as a whole.[22]

Healing and recovery require an intimate focus on the particular needs of an individual survivor, a focus that it is neither appropriate nor practical to expect the legal system to provide. Vik Kanwar has noted that "individual requirements for 'closure' are so personal that it would be difficult to conceive of any generalized remedy that could be properly tailored to this purpose."[23] Of necessity murder survivors must look outside the court system for their principal sources of support. Hence, Vivian Berger concludes:

> Above all, the penalty phase of a capital trial cannot function as a substitute therapeutic environment. Acknowledging that truth in no way implies a cold or complacent attitude toward the victims of the gravest offenses. To the contrary, such a posture permits frank focus on the actual purpose of the proceeding: to determine the 'personal responsibility and moral guilt' of the defendant. At the same time, it avoids cruelly raising the expectation of succor from an inappropriate source, only to disappoint many

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[22] *Id.* at 1605-06.

[23] Vik Kanwar, *Capital Punishment as 'Closure': The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. Rev. L. and Soc. Change 215, 239 (2001-2002).

> when the system turns upon them or their dead, wholly ignores them, or (at best) offers merely partial or temporary relief.[24]

MVFR disagrees with the statement that "Many victims cannot begin the healing process until the case is behind them."[25] The NOVA amici provide no support for this contention. On the contrary, it is clear that survivors of murder victims are often forced to begin to address their emotional suffering in the *absence* of the perpetrator's conviction. Indeed, the survivors in the 45% of murder cases where no conviction is obtained do so of necessity.

Lynne N. Henderson, herself a crime victim, has challenged persuasively the notion that healing is dependent upon guilty verdicts:

> Another myth that operates throughout the victim's rights literature is that criminal cases are endlessly delayed, usually but not always by wily defense counsel, and the victim 'cannot heal' or 'put the matter behind her' until there is a final judgment of guilt. This assertion is questionable, because healing takes place whether or not an offender is ever located, much less convicted. Nor does the healing process necessarily end with the successful resolution of a case.[26]

In an earlier article, she explains why emotional "resolution" does not ultimately depend on the outcome of the criminal case:

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[24] Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. U. L. Rev. 21, 59 (1992) (footnote omitted).

[25] NOVA brief at 12.

[26] Lynne N. Henderson, *Revisiting Victim's Rights*, 1999 Utah L. Rev. 383, 418 (1999).

> It is simplistic to assert that the rituals of condemnation will erase so profound an experience for an individual. Continuances and delays may cause a victim to relive the event, but a victim is likely to relive portions of the event whether or not there is a delay. Issues raised by victimization do not resolve themselves quickly: A reintegration and understanding of such questions as mortality, meaning, and responsibility take time.[27]

It is not clear whether NOVA amici are making an argument that an execution itself provides necessary assistance in the healing process. Such an argument would be extremely problematic, regardless of the view that one takes toward the legitimacy of capital punishment in general. There is no reliable empirical evidence to suggest that survivors experience substantial benefits from the execution of a convicted defendant. Margaret Vandiver has called attention to the dearth of available research on this issue:

> The effects of executions on homicide victims' families simply are not known. It may be that some families experience a real and lasting sense of peace and closure from the execution of their relative's killer. Statements made by victims' survivors at the time of execution often indicate that they feel a great sense of relief. No systematic interviews have been done with these families to learn whether the execution does result in long-term improvement in their emotional condition. Some families may find that the execution does not provide them much if any comfort. In fact, losing the object of their anger may leave them feeling empty and unfocused. If they have believed for years that the execution of

[27] Lynne Henderson, *The Wrongs of Victim's Rights*, 37 Stanford L. Rev. 937, 976-77 (1985).

> their relative's killer would bring them substantial emotional relief and it does not, they may even feel worse after the execution.[28]

The problematic nature of attempting to provide survivors of murder victims with "closure" through a relationship with the criminal justice system is transparent where "closure" has become confused with "satisfaction." Kanwar has recognized the risk of confusing "closure" with "satisfaction":

> The idea of 'closure' for victims has been explored in the therapeutic context (grief and finality) and 'satisfaction' has been whispered in the context of punishment (vengeance and finality), but as victims move to the center of the criminal trial, the lines are again blurring between the two concepts.[29]

Prior to the state's assuming responsibility for criminal justice, the survivors of murder victims attempted to obtain satisfaction from the killer or his family, often through violent means. Now that criminal prosecution is handled by the public prosecutor, it is society in general that is responsible for imposing punishments. Yet to the extent that the survivors of murder victims are perceived as having a personal stake in the outcome of criminal proceedings, there is a risk that the *goal* of a proceeding becomes providing satisfaction to the victim's survivors.

It is important to recognize, as Kanwar does, that the criminal justice system may provide "satisfaction," but that it cannot supply "closure" with respect to emotional suffering:

[28] Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in Acker, Bohm and Lanier, *America's Experiment with Capital Punishment*, 477, 484-485 (1998).

[29] Kanwar, *supra*, at 238.

> Even if the notion of victim satisfaction can be a legitimate consequence of punishment, what kind of satisfaction should we aim to produce? Should we aim to provide emotional closure associated with the cessation of grief, or should we seek to achieve immediate and efficacious satisfaction to individuals who associate their need for closure with feelings of vengeance and retribution? If closure is directed at grief, then it is unlikely that legal and procedural remedies can even begin to address this powerful emotion.[30]

When punishment becomes the primary focus of "closure" discourse,[31] the ostensible concern for "victims' rights" may become a cloak for advancing policy arguments that favor prosecution goals. This tendency has been noted by several commentators.[32] Henderson has chronicled this development, concluding, "Although 'victims' rights' may be viewed as a populist movement responding to perceived injustices in the criminal

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[30] *Id.* at 241.

[31] *See, id.* at 229.

[32] *See, e.g.* Susan Bandes, *Victim Standing*, 1999 Utah L. Rev. 331, 333-334 (1999) ("the sorts of victim initiatives that have been successful have been those, and only those, that advance the prosecution's own agenda"); Robert Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefitting the Prosecution*, 29 St. Mary's L. J. 1053, 1057-60 (1998)(giving examples of victims' rights that would have been enforceable against government but have been eliminated from current version of proposed Federal Victims' Rights Amendment); Lynne N. Henderson, *Revisiting Victims' Rights*, 1999 Utah L. Rev. 383, 384, ("crime control conservatives use victims and victims' rights to achieve ends other than helping victims recover"); Markus Dirk Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 Buff. L. Rev. 85, 127 (1993)("*Payne* did not respond to the arguably legitimate concerns of crime victims as much as it reflected the exploitation of these concerns in a widespread crusade against the rights of criminal defendants in general, and against those convicted of capital crimes in particular.")

process, genuine questions about victims and victimization have become increasingly co-opted by the concerns of advocates of the 'crime control' model of criminal justice."[33] Michael Radelet, a sociologist who has written several books on the death penalty, concluded, "The families get used and co-opted ... I don't even know what the term 'closure' means. Someone kills your child, there is no closure."[34] The sincerity of a stated concern for the need of survivors for resolution is certainly cast in doubt by the prosecution's mistreatment of victim family members who let it be known that they do not support the death penalty.[35]

CONCLUSION

If this Court is to consider the effect its decision may have on victims' families, it must consider the impact on all victims, not just those who may believe that their "resolution and recovery would be lost"[36] with the overturning of a death sentence. This brief demonstrates that new sentencing hearings for those defendants affected by holding *Ring* retroactive would not "have disastrous effects"[37] on all victims. Nor would retroactivity raise a "specter" that "the promise of resolution" will "vanish."[38] There is no basis for the

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[33] Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stanford L. Rev. 937, 951 (1985).

[34] Louis Romano, *With Death, Hope That Life Goes On; On the Eve of an Execution, Victims Yearn for Peace at Last*, Wash. Post, Aug. 8, 1996, at A1, available at 1996 WL 10725156.

[35] See Robert Renny Cushing & Susannah Sheffer, *Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty*. Published by Murder Victims' Families for Reconciliation, 2002.

[36] NOVA brief at 13.

[37] NOVA brief at 8.

[38] NOVA brief at 11.

assumptions that the survivors who might be affected by a holding that *Ring* should be applied retroactively have "found resolution," believe that they were "promised" resolution in the form of an execution, or have failed to attain a level of acceptance of their loss such that a re-sentencing proceeding would be "disastrous." The NOVA brief does not speak for all victims, and in fact specifically misrepresents the opinions and needs of the victims represented by this brief. Amici Susan Hill and Sally Schauble in particular would have the death sentences of their family members' killers overturned and are writing in support of a ruling that would bring that result.

Amici respectfully request this Court to rule for Respondent in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WARREN WESLEY SUMMERLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* WELSH S. WHITE, RUDY GERBER, W. J. MICHAEL CODY, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici adopt the questions presented as articulated in the Respondent's brief.

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STATEMENT OF INTEREST[1]

This case presents a question regarding the importance of the Sixth Amendment right of criminal defendants to a jury determination of the facts necessary to impose a death sentence. *Amici* are individuals and an organization with a particular interest in this Court's death penalty jurisprudence. Professor Welsh White has written extensively on the subject of the historic role of the jury in criminal cases generally and capital cases in particular. Rudy Gerber is an Arizona practitioner who handles death penalty cases *pro bono*. Mr. Gerber is a former Arizona appellate judge and was also involved in drafting the Arizona death penalty statute that was held to be unconstitutional in *Ring* v. *Arizona*, 536 U.S. 584 (2002). W. J. Michael Cody tried capital cases as the former attorney general of the State of Tennessee. He also has served as a United States Attorney for the Western District of Tennessee and as chair of the Tennessee Sentencing Commission and the Tennessee Supreme Court Commission on Indigent Defense.

The Southern Center for Human Rights has been engaged in litigation, public education, and advocacy since 1976 to protect the civil and human rights of people prosecuted in the criminal courts and confined in the prisons and jails of the South—particularly those facing the death penalty. The Center's lawyers provide direct representation to people facing the death penalty at trials, on appeals, and in post-conviction review.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF FACTS

To avoid burdening the Court with another recitation of the facts, *Amici* adopt the statement in the Respondent's brief.

SUMMARY OF ARGUMENT

This case raises the same specter of unconstitutional decision making in capital cases that was raised in *Ring* v. *Arizona*, 536 U.S. 584 (2002): namely, that a man may go "to his death because a *judge* found that an aggravating factor existed." *Id.* at 612 (Scalia, J., concurring). Warren Wesley Summerlin was sentenced to death as the result of a process that violated his Sixth Amendment right to a jury trial of all elements necessary to impose a death sentence. No one disputes this. As this Court held in *Ring*, the Arizona death penalty statute under which Mr. Summerlin was sentenced, Ariz. Rev. Stat. § 13-703, did not satisfy the requirements of the Sixth Amendment because "it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The sole question raised by this case is whether Mr. Summerlin, whose conviction became final before *Ring* was decided, is entitled to the same constitutional protections afforded the Petitioner in *Ring*.

Amici respectfully submit that *Ring* must apply retroactively for at least two alternative reasons—both grounded in the historic role of juries in capital cases: first, the decision in *Ring* implicated *substantive*, and not merely procedural, rights. As a result, the retroactivity bar of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), for new rules of criminal procedure does not apply. Second, even if the decision in *Ring* could fairly be understood as a new rule of criminal procedure, it should nevertheless apply retroactively because it satisfies the second exception articulated in *Teague*: namely, it "requires the observance of those procedures that . . . are implicit in the concept of

ordered liberty." *Id.* at 307 (internal quotation marks omitted) (quoting *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)). However the Court chooses to characterize its earlier decision in *Walton* v. *Arizona*, 497 U.S. 639 (1990) (plurality opinion), construing the same death penalty scheme, *Ring* not only confirms a bedrock constitutional principle, it also recognizes that having a jury, rather than a judge, determine all facts necessary to impose a death sentence is consistent with, and indeed mandated by, an extremely long common law history, much of which underlies the Sixth Amendment. According to that history, the jury is the principal and indispensable mechanism for determining those facts necessary to impose a death sentence. For many hundreds of years, the jury has been seen as "more accurate" in the sense that it more accurately reflects the "common sense" judgment of the community, see *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (plurality opinion), that a defendant should be sentenced to death.

Amici write separately to underscore the fundamental and historic nature of the right to a jury determination of all elements necessary to sentence a defendant to death. That history, not articulated in any detail by the other briefs submitted to the Court, makes clear that the Sixth Amendment guarantees that a criminal defendant is entitled to have a jury rather than a judge make the "factfinding necessary to put him to death." *Ring*, 536 U.S. at 609. That guarantee rings hollow unless it applies retroactively.

Lastly, *Amici* note that the concerns of comity and finality that gave rise to *Teague* have little force in the context of the decision articulated in *Ring*. With respect to comity, *Ring* only recognizes and corrects the fundamental misunderstanding of Arizona state law that led to this Court's decision in *Walton*. The responsibility for that error rests with the Court and its correction and retroactive application offend comity only insofar as the Arizona courts themselves

perpetuated (and were forced to perpetuate) that error. See *State* v. *Ring*, 25 P.3d 1139, 1152 (Ariz. 2001) ("*Ring I*") *rev'd*, 536 U.S. 584 (2002) (recognizing that the State is bound by *Walton* even though *Walton* misstated Arizona law). Where, as here, the underlying state legislation as well as state court interpretations of that legislation are driven by *federal* case law, the argument for comity is a tenuous one. As for finality, it hardly seems just or reasonable to invoke it against Mr. Summerlin, who has been contending for over 20 years—since before his sentence became final—that the Sixth Amendment entitles him to a jury determination of all facts necessary to sentence him to death, precisely the right vindicated in *Ring*. See J. A. at 49-50.

ARGUMENT

I. THE HISTORIC ROLE OF JURIES IN CAPITAL CASES DEMONSTRATES THAT *RING* ANNOUNCED A SUBSTANTIVE RULE.

A. At English Common Law, The Jury Played An Indispensable Role In Determining The Facts Necessary To Sentence A Defendant To Death.

As early as the thirteenth century, jury trials became the standard method for establishing guilt for felonies. See Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413, 421 (1975-1976) (hereinafter "Green I"). The medieval jury had exclusive control over the evidence necessary to make findings of fact, and judges were powerless to second-guess these findings. See *id.* at 424-25. Recognizing that their control of the evidence enabled them to determine whether a sentence of death could be imposed, juries frequently used their fact finding power to decline to condemn to death defendants guilty of less-culpable forms of homicide, prefiguring gradations that would later be enshrined in the law. See *id.*

The breadth of the jury's control of the trial process diminished somewhat in the sixteenth and seventeenth centuries with the "shift from a trial dominated by the self-informing jury to a trial based mainly on evidence produced by the prosecution." *Id.* at 491. But the jury remained the sole finder of fact, and continued to wield its power to spare from death those guilty of less-culpable forms of homicide by rendering verdicts entitling defendants to the "benefit of clergy," which would preclude capital punishment. See *id.* at 494. Capital homicide came to be defined as killing with "'malice aforethought.'" See 1 *Model Penal Code and Commentaries*, pt. 2, § 210.2, at 14 (1980) (herinafter "*MPC*"). With the emergence of this refined category of capital homicide came the requirement that an indictment for homicide specify the fact of "malice aforethought" in order for the death penalty to be an available sanction upon conviction. See 2 J. Bishop, *New Commentaries Upon The Criminal Law* § 727(2) (8th ed. 1892).

The extent of the jury's factfinding power generated tensions between juries and judges, who perceived that juries often misrepresented the facts to spare defendants from hanging. See Green I, *supra* at 496-97 & n.304. But in a sequence of clashes that defined the contours of the English jury right, the jury's fact finding power was declared paramount. In a celebrated case, the parliament censured Lord Chief Justice John Kelyng for his manipulation of juries in several cases tried between 1665 and 1667. See Thomas A. Green, *Verdict According to Conscience* 208 (1985). Among the most serious charges were allegations that the Chief Justice had threatened juries with fines to coerce them to raise their verdicts from non-capital manslaughter to capital murder. See *id.* at 214. Three years later the widely-noted Bushell's Case held that fact-finding was the province of juries, and that jurors could not be fined or imprisoned for their verdicts. See Green I, *supra* at 497 n.304.

B. This Unique Role Was An Integral Part Of The Sixth Amendment's History And Adoption.

The Framers adopted the Sixth Amendment against this long tradition of jury control over factfinding in capital cases. Colonial Americans understood the traditional right to a jury trial as precluding encroachments upon the jury's factfinding power with respect to criminal—and particularly capital—punishment. As this Court observed in *Ring* :

> [T]he English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

536 U.S. at 599 (quoting *Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting) (internal quotation marks omitted)).

The debate over the jury's role in seditious libel cases around the time of the adoption of the Bill of Rights underscores the central role of the jury in making factual determinations that stand as a predicate for imposition of a death sentence.[2] In the sedition context, the hotly-contested

[2] As this Court has recognized in considering that history:

> There was apparently some accepted understanding at the time that the finding of facts was simply too sacred a jury prerogative to be trifled with in prosecution for such a significant and traditional offense [seditious libel] in the common law courts. That this history had to be in the minds of the Framers is beyond cavil.

issue was not whether the jury's factfinding power could be infringed, but rather whether the jury should wield the power to find the law as well. See generally *Jones* v. *United States*, 526 U.S. 227, 246-47 (1999). For example, in a 1735 American case that attracted widespread attention on both sides of the Atlantic, Andrew Hamilton, attorney for a New York printer charged with seditious libel, relied upon the jury's power to determine whether the evidence amounts to murder or manslaughter to argue, by analogy, that the jury should also have the power to decide whether an article published by a newspaper was libelous or not. See J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 91 (2d ed. 1972).[3] Although the judge did not permit Hamilton to present to the jury evidence going to the truthfulness of the statements (*i.e.*, evidence that would inform whether the statements were libelous or not), Hamilton successfully introduced the idea to the jury by arguing that "the words themselves must be libelous—that is false, scandalous, and seditious, or else we are not guilty." V. Buranelli, *The Trial of Peter Zenger* 99 (1957). After hearing this argument, the jury acquitted. *Id.* The point of this and cases like it was not that the crime of libel had to include particular elements, but rather that the presence or absence of those elements—whatever they were—had to be determined by a jury.

State innovations in capital sentencing following the adoption of the Bill of Rights confirmed the jury's essential role. In 1794, Pennsylvania refined its capital sentencing scheme by creating a class of homicides called "first-degree" murder. Prior to that time, states generally applied the common-law classifications of homicide: a capital form

Jones v. *United States*, 526 U.S. 227, 247 (1999) (footnote omitted).

[3] Under New York colonial law (similar to English law), the jury's role was to determine (1) the fact of publication, and (2) at whom the comments were made. *See* Alexander, *supra*, at 91. The actual finding of "libel" was left to the judge. *Id.*

labeled "murder" and a non-capital form labeled "manslaughter." See *MPC* § 210.2, at 16; *id.* § 210.6, at 121-22. Responding to a popular perception that the death penalty was not appropriate for all defendants guilty of murder, Pennsylvania narrowed its definition of capital homicide to include only murders of "'the first degree,'" defined as those "'perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary.'" *Id.* § 210.6, at 123 (quoting 1794 Pa. Laws, ch. 257, §§ 1, 2). The Pennsylvania innovation quickly spread to other states and became the predominant form of capital homicide in America. See *id.* § 210.6, at 123-24. In the course of these innovations, it remained universally understood that the jury, and the jury alone, would make the factual determinations that state law required for the imposition of a death sentence.

Over the past two centuries, the States have continued to revise their definitions of capital murder. Despite its initial popularity, the Pennsylvania scheme came to be seen as inadequate to "achieve a rational or intelligible limitation of capital murder." *Id.* § 210.6, at 124. Many found the limiting language confusing or unfair as applied. See *id.* § 210.6, at 124-26. Moreover, juries commonly "balked at conviction of the capital offense," even under the narrower definition, and returned guilty verdicts on a lesser offense or even acquitted defendants rather than find them guilty of first degree murder. *Id.* § 210.6, at 129-30. This dissatisfaction led to the next major innovation, introduced by Tennessee in 1838, which allowed juries to determine whether the facts justified a capital sentence in each case. The scheme introduced that year in Tennessee and subsequently adopted by many other states—including Arizona—provided that the jury would first determine the defendant's guilt of the highest degree of homicide, and *then* decide whether the death penalty was appropriate.

C. Until *Furman* v. *Georgia*, 408 U.S. 238 (1972), Arizona's Death Penalty System Required The Jury To Find All Facts Necessary To Sentence A Defendant To Death.

Arizona's experience parallels these historical trends. Arizona's first penal laws were copied almost in their entirety from the Penal Code of California (see Ariz. Rev. Stat., Penal Code Preface (1913)), and, like California, included a Pennsylvania-style definition of first-degree murder, see *id.* § 172, and further specified that the death penalty could be imposed for that crime only "at the discretion of the jury." *Id.* § 173. Under the 1901 Code and subsequent codes, the jury had sole responsibility to determine "the degree of the crime." See, *e.g.*, § 972 (1901), § 1090 (1913). Following a partial abolition of the death penalty between 1916 and 1918 (see 1917 Ariz. Sess. Laws, Initiative and Referendum Measures 4-5; 1919 Ariz. Sess. Laws, Initiative and Referendum Measures 17-21), Arizona reenacted, in 1919, the pre-existing provisions regarding first-degree murder and the death penalty, including jury degree-finding and sentencing, and this system remained virtually unchanged until 1973. See Ariz. Rev. Stat. §§ 4584, 4585 (1928); Ariz. Rev. Stat. §§ 43-2902, -2903 (1939).

The Arizona Supreme Court described that system as follows: the homicide statute "does not have the effect of creating two grades of the offense, one of which is punishable by death and the other by life imprisonment." *Hernandez* v. *State*, 32 P.2d 18, 21 (Ariz. 1934). The court went on to observe that, because the statute committed to the jury the choice between death and life in prison, the trial court must *not* do anything more than instruct the jury on the elements of the offense and the jury's responsibility to select the appropriate sentence: "A choice between these two penalties having been committed to the jury, it should be permitted to discharge this function unaffected and uninfluenced by any statement of the court as to what portions of the evidence it

shall consider in determining the matter." *Id.* Thus, under Arizona law from the early twentieth century until 1973, (1) the jury decided between life or death; (2) its decision was "unguided" by aggravating factors; (3) juries decided the degree of the homicide charge; and (4) the statutory definition of first degree murder included undifferentiated capital and non-capital options.

On June 29, 1972, this Court held Georgia's death penalty statute unconstitutional in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), because jurors, like those in *Hernandez*, were given no standards for capital sentencing, an error this Court recognized as rendering a death sentence cruel and unusual because of its potential arbitrariness. Because the procedure in every capital state matched that in Georgia, Furman effectively invalidated every state death penalty statute then existing. Bound by *Furman* and subsequent decisions of this Court, Arizona courts invalidated the sentencing scheme then in effect. See *State* v. *Endreson*, 506 P.2d 248, 254 (Ariz. 1973).

Furman prompted extensive efforts to redefine capital homicide among those states wishing to retain it. Although *Furman* did not dictate any specific model to the States, many states (including Arizona) adopted a model that had been suggested a decade earlier in the American Law Institute's Model Penal Code. The Model Penal Code effectively redivided first degree murder into capital and non-capital variants, providing that first degree murder would be punishable by death only when at least one of several enumerated "aggravating circumstances" was found to be present. See *MPC* § 210.6, at 107-10; cf. Ariz. Rev. Stat. §§ 13-703, -1105.

As part of the response to *Furman*, Arizona and a few other states went further and assigned the responsibility for finding these aggravating factors not to the jury, but to a single judge. Thus, under Arizona law in 1973, a trial judge sitting alone would now make findings on the existence of each of the new

statutory aggravating and mitigating circumstances. If the judge found an aggravating circumstance, the burden then shifted to the defendant to present sufficient mitigation to the judge or the death penalty would be imposed. See Ariz. Rev. Stat. § 13-703.A; see also *Arizona* v. *Rumsey*, 467 U.S. 203, 210 (1984) (describing the Arizona scheme).

Thus, for the first time in some seven centuries of Anglo-American jurisprudence, a criminal defendant could be sentenced to death by something less than a jury determination of all the elements of the offense necessary to impose such a sentence.

In *Walton* v. *Arizona*, 497 U.S. 639 (1990), the Court upheld this scheme. Specifically, the Court, relying on its prior decision in *Poland* v. *Arizona*, 476 U.S. 147 (1986), rejected the argument that the aggravating factors in Arizona constituted "elements of the offense," and concluded instead that, under the law in effect at the time, they were merely "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment." *Walton*, 497 U.S. at 648 (internal quotation marks and alterations omitted).

In *Ring*, the Court recognized that its interpretation of the Arizona sentencing scheme in *Walton* was mistaken and overruled *Walton*. The Court concluded that, because the aggravating factors operated as "the functional equivalent of an element of a greater offense," the Arizona scheme violated the Sixth Amendment. 536 U.S. at 609 (internal quotation marks omitted).

D. This History Confirms That Both *Walton* And *Ring* Addressed Issues Of Substantive Law And Not "Merely" Procedure.

Both Petitioner and the United States as *Amicus Curiae* attempt to press the *Ring* decision into the *Teague* framework—and thereby avoid the retroactive effect of *Ring*—by characterizing the "new" rule of *Ring* as simply addressing

the question of "who must be the decisionmaker on a particular fact, or how that decisionmaker should go about deciding the fact." Brief of United States ("U.S. Brief") at 7; see also Pet. Br. at 7. By cribbing the holding of *Ring* in such fashion, they attempt to argue, by extension, that *Ring* "presents a quintessentially procedural issue." U.S. Br. at 7.

This argument is wrong on at least two counts. First, when viewed through the long prism of history, the entirety of the debate in this area was not over a simple "procedural" question of *who* makes the relevant determination, but a substantive debate over *what* constitutes a capital crime and therefore what factors fall within the unique province of the jury. In this light, *Ring* plainly announced a decision that was, at least in part, substantive with regard to the nature of capital offenses. Second, the repeated attempts of Petitioner and her *Amici* to characterize the *Ring* decision as "merely" announcing a procedural change or "simply" affecting "who" may decide relies upon a faulty semantic distinction between substance and procedure that ignores the fundamental and historic nature of the Sixth Amendment right confirmed in *Ring*.

(1) The decisions in both *Walton* and *Ring* are substantive in nature. If Petitioner is correct that the decision in *Ring* turns only on the "the identity of the decisionmaker" (see U.S. Br. at 12), then *Walton* must stand for the proposition that a judge can decide some of the "elements" necessary to sentence a defendant to death, while *Ring* must stand for the opposite proposition. In fact, this would mischaracterize *both* holdings.

As this Court has recognized, *Walton* did *not* hold that a judge can determine certain facts necessary to impose a sentence of death. Rather, *Walton* held—based on a mistaken interpretation of Arizona law—that a judge could determine which homicide defendants were death eligible. See *Jones*, 526 U.S. at 251 (characterizing *Walton*). Put differently, *Walton* held that the judge-determined aggravating factors

were not "elements" of the offense; consequently, it was appropriate for the judge to decide them. See *Ring*, 536 U.S. at 598 (also characterizing *Walton*). Thus, *Walton* turned on a substantive (if erroneous) interpretation of Arizona law.

The rule reaffirmed in *Ring* was similarly substantive. Certainly, the analysis in that decision cannot be dismissed as involving only the procedural question of "who decides." In particular, the Court considered—and rejected—several substantive arguments that Arizona put forward in defense of its death penalty scheme. As the Court recognized, despite Arizona's arguments to the contrary, "[i]n effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 604 (internal quotation marks and alterations omitted). Moreover, regardless of how the State chose to characterize the aggravating factors, under the Arizona scheme they constituted "elements" of the offense. See *id.* at 605; see also *id.* at 609 ("Because Arizona's enumerated aggravating factors operate as '*the functional equivalent of an element* of a greater offense,' *Apprendi*, 530 U.S., at 494, n.19, the Sixth Amendment requires that they be found by a jury.") (emphasis added).

The effect of *Ring* is that the jury now sets the grade of first degree murder by finding the defined "attendant circumstances," and thus elevates first-degree to capital murder. Finding these facts establishes a separate, substantive offense.

(2) Second, Petitioner and her *amici* repeatedly mischaracterize the "substance" of the Sixth Amendment right reaffirmed in *Ring*, attempting to trade on a semantic distinction between "substance" and "procedure" that disregards the character and history of that right and that, in any event, is not nearly as clear as Petitioner would like.

For example, the Brief of the United States is shot through with subtle efforts to downplay the significance of the right at issue in *Ring*. See, *e.g.*, U.S. Brief at 9 ("*Ring*, in turn, simply

applied *Apprendi*" "[A] *Ring* error . . . . consists merely in the failure to submit a single factual issue to the jury"); *id.* at 12 ("*Ring* . . . merely placed a constitutional constraint on the identity of the decisionmaker"); *id.* at 15 ("The Court in *Ring* simply held . . . ."). This flurry of adverbs is hardly appropriate to describe a right characterized by Blackstone as 'the grand bulwark' and 'palladium' of English liberty. See *Jones*, 526 U.S. at 246 (emphasis omitted) (quoting 4 Blackstone, *Commentaries* 342-43 (1769)); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000) (describing the Sixth Amendment right to trial by jury as the "'great bulwark of [our] civil and political liberties'") (alteration in original) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)).

Moreover, Petitioner's "procedural" argument rests upon a distinction between "substance" and "procedure" that is not nearly so clear as Petitioner would have it. The Court itself has often called into question the legitimacy and efficacy of these semantic categories. See, *e.g.*, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 727 (1988) (plurality opinion) ("[T]he words 'substantive' and 'procedural' themselves . . . do not have a precise content . . . ."); see also *Mistretta* v. *United States*, 488 U.S. 361, 392 (1989) (describing the challenge of distinguishing between "substantive" and "procedural" rules as a "logical morass"). In any event, for all the reasons shown above, Petitioner's characterization of *Ring* as articulating "merely" a rule of procedure is wrong.

Finally, it is not at all obvious, even if this case were only about "who decides" (as opposed to what must be deemed elements of a capital offense for constitutional purposes), that Petitioner's effort to cast this case as merely procedural would succeed. After all, the Framers recognized that for serious crimes such as libel "the finding of facts was simply too sacred a jury prerogative to be trifled with." *Jones*, 526 U.S. at 247. Moreover, this Court has never suggested that the question of "who decides" is a matter of "mere"

procedure. Cf., *e.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 330 (1980) (describing the right to trial *by jury* as an "indispensable protection"); *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968) (describing the right as a "fundamental right, essential for preventing miscarriages of justice"). At bottom, the rule announced in *Ring* will require far more substantive changes in the Arizona scheme than any purely procedural rule would warrant.

II. EVEN IF *TEAGUE* GOVERNS, *RING* SHOULD APPLY RETROACTIVELY BECAUSE IT RE-DEFINED A BEDROCK PRINCIPLE OF CONSTITUTIONAL LAW.

Assuming, in the alternative, that *Ring* announced a "new" rule of constitutional "procedure" and, consequently, is subject to analysis under *Teague*, *Ring* should nevertheless apply retroactively because it redefined a bedrock principle of constitutional law. As indicated above, if *Ring* announced a "new" rule of constitutional procedure (the jury must decide all elements necessary to sentence a defendant to death), then it necessarily must have replaced the "old" rule announced in *Walton* (a judge can decide one or more of those elements). See *supra* at 12. As such, *Ring* would satisfy the second *Teague* exception because it "requires observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (internal quotation marks omitted) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)).

In *Teague*, this Court articulated a test to apply to new rules of criminal procedure to determine whether such rules should apply retroactively on collateral review. See *id.* at 299-311. *Teague* specifically adopted standards originally articulated by Justice Harlan in *Mackey* v. *United States*, 401 U.S. 667, 692-95 (1971) (plurality opinion). The second *Teague* exception, and the only one potentially relevant in this case, recognized that even a new rule of procedure should be applied retroactively on collateral review if it implicates

procedures that are "implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (internal quotation marks omitted). *Teague* refined this second exception further by concluding that such exceptions should apply only to "watershed" rules of criminal procedure: *i.e.*, rules that implicate both the "fundamental fairness" element of *Mackey*, and the "accuracy" element articulated by Justice Harlan's dissenting opinion in *Desist* v. *United States*, 394 U.S. 244 (1969). This latter element focused on whether the new rule at issue would create an "impermissibly large risk that the innocent will be convicted" if the Court fails to apply it retroactively. *Id.* at 262 (Harlan, J., dissenting).

On its face, this second "accuracy" element does not seem to apply to a jury determination of facts necessary to sentence a defendant to death, at least not in the usual way that term is applied. In that context the relevant "accuracy" consideration is not whether an "innocent [defendant] will be convicted," *id.*, but whether the factfinding process will accurately determine whether death is an appropriate sanction. Put differently, in the death penalty context, the "accuracy" at issue is more the accuracy of the process than the accuracy of the result.[4] See generally Note, *Ninth Circuit Holds That The Supreme Court's Decision in Ring v. Arizona Applies Retroactively To Cases On Habeas Corpus Review*, 117 Harv. L. Rev. 1291, 1295-96 (2004) (explaining why the Ninth Circuit should have focused on "procedural" rather than "results-oriented" accuracy in analyzing the issues presented in the instant case).

Thus, in the capital context, the appropriate inquiry in evaluating retroactivity is (1) whether the rule implicates

[4] Otherwise, the analysis would turn on the difficult question of whether judges or juries are more accurate fact finders—a consideration that this Court has held cannot define the proper scope of a defendant's Sixth Amendment rights. *See Ring*, 536 U.S. at 607 ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.").

matters of fundamental fairness, and (2) whether it enhances the accuracy (the procedural accuracy) of the proceedings. By these measures, *Ring* should apply retroactively.

First, for all the historical reasons shown in Part I, *supra*, the right to a jury determination of all facts necessary to impose a death sentence implicates matters of fundamental fairness. This Court concluded as much in *Ring* itself:

> Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . [But] [t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial was one of the least controversial provisions of the Bill of Rights."

536 U.S. at 607 (omission in original) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring)); *accord Duncan*, 391 U.S. at 156 ("Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.").

To see how this implicates fundamental fairness, one need only consider how differently Mr. Summerlin's sentencing phase would have looked had he originally been accorded his Sixth Amendment right to a jury determination of all facts necessary to impose the death sentence. Had the jury been required to find the aggravating factors, both the prosecution and the defense would have had to marshal evidence on those factors and formally present that evidence to a jury of Mr. Summerlin's peers. Doubtless, the process would have looked far different than what actually occurred in Mr. Summerlin's case. See *Summerlin* v. *Stewart*, 341 F.3d 1082, 1089 (9th Cir. 2003) (describing the brevity of Mr. Summerlin's sentencing hearing).

Second, having the jury find all facts necessary to the imposition of a death sentence is more accurate because long-established tradition both in the United States and at Common Law suggests that society trusts juries—rather than judges—to more accurately reflect the common sense judgment of the community in determining the facts necessary to sentence a defendant to death. See generally *Williams* v. *Florida*, 399 U.S. 78, 100 (1970) ("[T]he essential feature of the jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .").

This value draws strength, not from the Eighth Amendment (which implicates community values in a different way),[5] but from the Sixth Amendment itself. As shown above, this value dates back to early English common law, in which juries wielded almost exclusive control over the facts necessary to sentence a defendant to death, see Green I, *supra,* at 424-25, and through the adoption of the Bill of Rights, see *Jones*, 526 U.S. at 247-48. As such, the Sixth Amendment right to a jury determination of all facts necessary to impose a sentence of death, see *Ring*, 536 U.S. at 609, is a "bedrock" principle of law, and, to the extent *Walton* marked a deviation from that principle, *Ring* marked a "watershed" reaffirmation of that right.

---

[5] The point is not whether and to what extent community values inform whether capital punishment is appropriate in and of itself, as in *Atkins* v. *Virginia*, 536 U.S. 304, 316 (2002) (concluding that a "national consensus" dictates the execution of mentally retarded defendants is "cruel and unusual"); rather, the point is that within the framework of capital cases, our legal traditions reserve an indispensable role for the jury to reflect the "common sense of the community" in determining whether a defendant should be *eligible* for the death penalty. *Cf. Ballew*, 435 U.S. at 232 (Blackmun, J.) (plurality opinion) (observing in the context of the Sixth Amendment that juries must be of sufficient size to properly apply the "common sense of the community" to the facts).

III. THE PRINCIPLES OF COMITY AND FINALITY THAT UNDERLIE THE RULE ANNOUNCED IN *TEAGUE* HAVE LITTLE FORCE IN THE CONTEXT OF THIS CASE.

Lastly, an analysis of the principles of comity and finality that underlie *Teague* confirms that *Teague* does not apply to *Ring* or, alternatively, that *Ring* should apply retroactively under *Teague*'s second exception. In *Mackey* v. *United States*, 401 U.S. 667 (1971), Justice Harlan observed that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693 (Harlan, J., concurring in part and dissenting in part). Although he made that statement in the context of discussing what later became enshrined as the first *Teague* exception, the idea embodied in that statement applies with equal force here. *Amici* respectfully submit that the criminal process should never have been permitted to reside at a point where a mistaken federal interpretation of state law sanctioned an unconstitutional death penalty scheme. The principles of comity and finality should have little force in such cases, where the state decisions at issue are themselves based on mistaken interpretations of state law by federal courts.

In this case, both the underlying Arizona statute held unconstitutional in *Ring* and state court interpretations of that statute were driven by federal case law. More specifically, the capital sentencing scheme that Arizona had in place until 1973 fully complied with the requirements of the Sixth Amendment in that a jury—rather than a judge—had to make all factual determinations necessary to impose a sentence of death. When Arizona modified that scheme in 1973 in an effort to comply with *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), it unwittingly vitiated the Sixth Amendment rights of capital defendants by assigning to the sentencing judge the responsibility to make factual determinations as to the aggravating factors. This Court

upheld Arizona's scheme in *Walton*, 497 U.S. at 649, and Arizona courts were compelled to follow *Walton* even though it mis-characterized Arizona law. See, *e.g.*, *Ring I*, 25 P.3d at 1152 (recognizing that the State is bound by *Walton*).

In short, both the underlying Arizona statute *and* the state courts' defense of that statute were driven by this Court's decisions. Moreover, *Walton* avoided the fundamental question later addressed in *Apprendi* and *Ring* only by misinterpreting Arizona state law. Having admitted in *Ring* that *Walton*'s interpretation of Arizona's death penalty statute was inaccurate, there would be something manifestly unjust in denying Mr. Summerlin's claims based on principles of comity.

Although finality remains a consideration, that principle alone cannot justify denying to Mr. Summerlin the benefit of the rule announced in *Ring*. For over 20 years, Mr. Summerlin has been making the argument that he was denied his full Sixth Amendment rights when an Arizona state judge, sitting without a jury, determined that aggravating circumstances warranted the death penalty—the precise reasoning adopted belatedly in *Ring*. Indeed, he made this argument on direct appeal before his sentence became final. See J. A. at 49-50. Thus, it would be bitter irony to deny this claim on the principle that he is raising it too late. More importantly, however important the principle of finality may be in the abstract, standing alone it must give way before a preeminent constitutional value such as the one raised here: the right of a criminal defendant to have a jury determine all facts necessary to the imposition of the death penalty.

CONCLUSION

For all these reasons, the decision of the Ninth Circuit granting Mr. Summerlin's writ of habeas corpus should be affirmed.

Respectfully submitted,

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DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner

v.

WARREN WESLEY SUMMERLIN

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 individual members nationwide and 28,000 affiliate members in 50 States, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research of criminal law issues, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal habeas corpus. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

SUMMARY OF ARGUMENT

A. This Court's framework for determining retroactive application of constitutional rules on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989), is based on a series of legal determinations regarding the nature of the claim at issue. In adopting that framework, the Court expressly discarded its earlier, multi-factor balancing test for determining retroactivity. The State and its *amici* nonetheless suggest that one reason for the Court to refuse to apply *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

under *Teague* is because of what they claim will be the significant number of defendants affected by such a ruling, especially to the extent *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would also be applied retroactively. But such concern about the effect on other defendants was one of the factors that caused difficulties under the pre-*Teague* balancing test, involving as it did more policy judgments than legal principles, thereby undermining consistency and predictability. Thus, the Court should reject the invitation to rely on speculative and unsubstantiated concerns about the effect on other defendants as a basis for denying retroactivity of *Ring* or *Apprendi*.

B. *Teague* does not bar the application on collateral review of the constitutional rules articulated in *Ring* and *Apprendi* because both are rules of substance, not procedure. After *Apprendi*, a court has two options when confronted with a statute that increases the statutorily authorized maximum sentence based on a particular fact. On the one hand, a court may interpret the statute and construe the fact to be an element of the offense that must be submitted to the jury. Such an interpretation goes to the substance of what constitutes the crime. The Court's decisions in *Bousley v. United States*, 523 U.S. 614 (1998) and *Fiore v. White*, 531 U.S. 225 (2001), illustrate that persons previously convicted under an erroneous interpretation of the statute are entitled to retroactive application of the correct interpretation.

On the other hand, a court may interpret the statute to preclude submission of the fact to a jury. The court would then be required under the Supremacy Clause to declare unconstitutional any portion of the statute that authorized reliance on the judge-found fact to increase the statutory maximum sentence. The substance of the offense would have changed and the State would be unable to sentence persons to the aggravated version of the crime that bears the increased maximum sentence, again yielding a substantive ruling.

C. The substantive rules of *Ring* and *Apprendi* also trigger a range of fundamental procedural protections and even if the Court were to deem the rules to be only procedural, *Teague* does not prohibit their application on collateral review. By expanding the scope of certain fundamental procedural protections that enhance the accuracy of convictions, *Ring* and *Apprendi* reflect a revised understanding of the application and scope of those bedrock procedural elements and therefore constitute a watershed change in constitutional law.

Ring and *Apprendi* are not just about who decides a certain fact necessary to conviction of an aggravated offense. *Apprendi* also held that the prosecution must prove such fact beyond a reasonable doubt. The burden of proof "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). And the rules of *Ring* and *Apprendi* also trigger the Sixth Amendment's Confrontation Clause, which enhances the accuracy of criminal convictions by restricting the prosecution's use of evidence traditionally viewed as unreliable and guaranteeing defendants the right to cross-examine witnesses. Consequently, this Court held that its cases involving both the reasonable-doubt standard and the Confrontation Clause were to be given retroactive effect. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Berger v. California*, 393 U.S. 314, 315 (1969).

The right to a jury determination of guilt also increases the accuracy of the proceeding. This Court recognized this in *Ballew v. Georgia*, 435 U.S. 223, 232 (1978), when it struck down the use of five-member juries because the reduction in jurors "leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." Although the Court did not retroactively apply another case holding that the jury trial right applies to the States, that determination was based on a pre-*Teague* ad hoc balancing analysis. More relevant is *Brown v. Louisiana*, 447 U.S. 323, 334 (1980), where the

Court gave retroactive effect to the rule requiring a unanimous six-person jury in state criminal trials because the rule implicated "the very integrity of the fact-finding process." That is true of *Ring* and *Apprendi* as well.

D. Although irrelevant to the *Teague* analysis, the State and its *amici* overstate the likely impact that retroactivity of *Ring* and *Apprendi* would have in habeas corpus litigation. They disregard the numerous hurdles under the procedural default doctrine and congressional amendments to the federal habeas corpus statute that must be overcome by a criminal defendant seeking collateral relief.

Even with regard to the significant number of convictions under the principal federal drug statute, 21 U.S.C. § 841, the retroactive application of *Apprendi* would not place an unwarranted burden on the administration of justice. *Apprendi* does not undermine any maximum sentence increased based on a prior conviction in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Apprendi* also does not affect an increase in a statutory mandatory minimum sentence that does not also increase the statutory maximum sentence.

Even among the courts that have found *Apprendi* retroactive, relief has been uncommon. In some Section 841 cases, courts have found no *Apprendi* error because the type and quantity of drugs had been submitted to the jury. Other courts have denied habeas relief because they have concluded that the jury could have found the quantity beyond a reasonable doubt. Other courts have relied on other counts of conviction that increased the maximum sentence beyond that imposed. Still others have found *Apprendi* error irrelevant because the sentence imposed did not exceed the 20-year statutory maximum sentence for the lesser offense under 21 U.S.C. § 841(b)(1)(C).

Thus, Section 841 cases are a far cry from cases under *Bousley*, *supra*, where every prisoner could make a threshold showing of prejudice because the statute mandated a consecutive five-year sentence. Yet, even with

the federal government's widespread reliance on the statute at issue in *Bousley*, neither the State nor the federal government demonstrate that collateral proceedings under that ruling constituted an unwarranted burden on the administration of justice. Similarly, the *amici* States fail to identify significant actual or likely effects from retroactivity of *Apprendi*, despite one *amicus* State's application of *Apprendi* retroactively in state habeas proceedings for more than two years.

ARGUMENT

RESPONDENT IS ENTITLED TO HABEAS CORPUS RELIEF ON HIS SIXTH AMENDMENT CLAIM

Petitioner, the Director of the Department of Corrections for the State of Arizona ("State"), asks this Court to hold that *Ring v. Arizona*, 536 U.S. 584 (2002), should not be applied to respondent's petition for federal habeas corpus relief challenging his sentence of death. The State argues that application of *Ring* to respondent's case would constitute a retroactive application of law on collateral review contrary to the doctrine established by the Court in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. One of the State's arguments is that retroactive application of *Ring* would mean that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would likewise apply retroactively in federal habeas proceedings, and that the Court must avoid the "additional litigation" and "confusion" that would result from such a ruling. Pet. Br. 9, 32; *see also* U.S. Br. 13-14 & n.1 (arguing question of the retroactivity of *Apprendi* as well as that of *Ring*); Br. of Nebraska and 15 Other States as *Amici Curiae* 20-21.

The court of appeals correctly held that the rule of constitutional law announced in *Ring* should be applied retroactively even if the rule of constitutional law announced in *Apprendi* is not. The NACDL demonstrates below, however, that *Apprendi* also meets this Court's requirements for retroactive application under *Teague*. And the NACDL believes that the State and its *amici* overstate the likely

impact that retroactivity of *Apprendi* would have in habeas corpus litigation. As the NACDL will explain, even with regard to the significant number of convictions under the principal federal drug statute, 21 U.S.C. § 841, the retroactive application of *Apprendi* would not place an undue burden on the administration of justice. In any event, concern over such collateral consequences from a retroactivity ruling should not alter the result of a *Teague* analysis generally, and certainly should not in this case involving a defendant sentenced to death in violation of the Sixth Amendment.

A. *Teague* Is Rooted In The Nature Of The Constitutional Ruling At Issue And Does Not Vary Depending On Concerns About The Effect Of A Retroactivity Ruling On Other Cases

1. a. This Court has held that a rule of constitutional law announced in a case applies retroactively to cases pending on direct review at the time the rule is announced, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), and also to cases on federal habeas corpus relief if, in the latter circumstance, the rule is not new or is substantive. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (rules that are not new); *Bousley v. United States*, 523 U.S. 614 (1998) (rules that are substantive).

With regard to constitutional rulings that are new and procedural, the Court in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and *Penry* added another aspect to that analytical framework to guide courts in determining whether a criminal defendant with such a claim is entitled to habeas corpus relief. This retroactivity framework is based on a series of legal determinations regarding the nature of the claim at issue, including whether the rule removes certain

primary conduct from criminal sanctions, and whether the rule involves bedrock procedural protections.[2]

In adopting this legal framework, the *Teague* Court expressly discarded a multi-factor balancing test for determining retroactivity. That earlier balancing test had weighed, *inter alia*, "the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule." *Teague*, 489 U.S. at 302. Such considerations were taken into account in the *Teague* rule itself, by its distinguishing between cases on direct appeal and collateral attack and its narrow exceptions.

One reason for *Teague*'s express abandonment of the Court's prior balancing test was the difficulty experienced by the Court in determining, with any sense of accuracy, the actual effect that a new rule would have on the administration of justice. *See id.* at 302-304 (plurality). Justice Harlan's separate opinions in earlier cases, which were precursors for the *Teague* rule, identified such difficulties as the reason that a change in the standard was necessary. He explained that the former retroactivity doctrine that relied on a balancing test "bespeaks more

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[2] Specifically, a court determining whether a constitutional rule should be applied in a federal habeas proceeding must determine: (1) if the defendant is seeking application of a "new" rule that was not in existence at the time his case became final on direct appeal or, instead, is merely seeking application of a rule dictated by past precedent, in which case it will apply in habeas proceedings, *Penry*, 492 U.S. at 314; (2) if the rule is new, whether it is a "substantive" rule, in which case it will apply in habeas proceedings, *Bousley*, 523 U.S. at 620; (3) if the new rule is procedural, instead of substantive, whether it comes within (a) the exception for rules that "place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Penry*, 492 U.S. at 329 (internal quotation marks omitted); or (b) the exception for rules that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" when "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotations marks omitted).

considerations of policy than of legal principle." *Mackey v. United States*, 401 U.S. 667, 700 (1971) (separate opinion of Harlan, J.). He also noted that decisions regarding retroactivity were used by some members of the Court to revisit the underlying merits of the previously announced decisions, leading to "incompatible rules and inconsistent principles." *Desist v. United States*, 394 U.S. 244, 258 (1969) (separate opinion of Harlan, J.).

b. The difficulty of making a determination about the actual effect of a new rule on cases pending on collateral review has multiplied in light of Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA imposed, in addition to the *Teague* retroactivity rule, new procedural and substantive barriers for state and federal prisoners seeking to challenge a conviction or sentence through a federal habeas corpus petition. Although respondent's petition is not governed by AEDPA (because it was filed before the statute's effective date), AEDPA's limitations on both first and successive habeas petitions would need to be considered if the Court were to take into account in this case the practical effect that any *Ring* or *Apprendi* retroactively ruling would have in other instances.

2. This Court's adoption of *Teague*'s legal rules to avoid reliance on speculative policy concerns about the number of cases that could be affected in determining the applicability of federal law in habeas corpus proceedings is consistent with the Court's other habeas corpus doctrines. The Court has held that interests in finality and comity require that, in certain circumstances, a criminal defendant's federal constitutional claims, even though meritorious, be denied in a habeas corpus proceeding. That is so even if a defendant will be executed notwithstanding the constitutional error. The weightiness of that result – that persons can be put to death even when the government engages in unconstitutional conduct – means that close scrutiny must be given to the rules, particularly court-created rules, that would bar relief

under such circumstances and that the Court's speculation about the possible effect on other cases not dictate the result.

Thus, arguments of the State (Pet. Br. 9, 31-34) and its *amici* that the retroactive application of *Ring* and *Apprendi* on collateral review would impose societal costs and strain the judicial system should not undermine this Court's determination that the rules of *Ring* and *Apprendi* meet the *Teague* criteria for retroactivity. Relying on concerns regarding the potential impact of *Ring*'s retroactivity would be especially inappropriate in the instant case where respondent raised the constitutional issue as early as 1984 on his direct appeal, and it was erroneously rejected by the state court based on a misreading of this Court's precedent, all of which predated this Court's rulings that put his claim into question. *See State v. Summerlin*, 675 P.2d 686, 695 (Ariz. 1984) (misreading *Proffitt v. Florida*, 428 U.S. 242 (1976), to require rejection of respondent's Sixth Amendment claim).

It would cause even greater damage to the *Teague* analysis to accept the State's invitation to rely on speculation about the effect that the possible retroactive application of another case, *i.e.*, *Apprendi*, may have. Although members of the Court expressed concern about *Apprendi*'s effect, including its effect on convictions under the federal drug statutes, with regard to determining whether to recognize the underlying constitutional right, *see Apprendi*, 530 U.S. at 551 (O'Connor, J., dissenting); *Ring*, 536 U.S. at 620-621 (O'Connor, J., dissenting), the retroactivity context requires a different analysis. The State is wrong to attempt to rely again on that issue in this context because *Ring* and *Apprendi* are now the law of the land. Disputes about the merits of those rules are no longer at issue and the Court must determine whether to apply them retroactively, as *Teague* requires, without resurrection of those concerns.

B. *Teague* Does Not Bar Application Of *Ring* Or *Apprendi* On Habeas Corpus Review Because Both Affect The Scope Of The Underlying Criminal Statute And Therefore Are Rules Of Substance

Under the standards developed in *Teague* and its progeny, the constitutional rule articulated by this Court in *Ring*, as well as the rule of *Apprendi*, should apply on collateral review because those rules are substantive, not procedural. The court of appeals correctly held that *Ring* governs issues of substance. The special circumstances of capital punishment would make *Ring* substantive even if *Apprendi* were not. But *Apprendi* is also substantive and therefore applies retroactively for reasons that apply to *Ring* as well, apart from the capital sentencing context.[3]

Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is part of the criminal offense for purposes of the Sixth Amendment and thus "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The State argues (Pet. Br. 19, 22-25) that this rule governs only procedural components of a trial – *i.e.*, the identity of the decision maker – and does not govern the substance of the underlying statute. That misconceives *Apprendi*.

After *Apprendi*, a court has two options when confronted with a statute that increases the statutorily authorized

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[3] The State and its *amici* suggest that this Court already has held that *Apprendi* is procedural rather than substantive within the meaning of *Teague*, and argue that the Court should necessarily hold that *Ring* is procedural as well, and therefore not retroactive. Pet. Br. 7, 13-16; *see also* U.S. Br. 13, 19. But they take the *Apprendi* Court's statement about "procedure" out of context. The *Apprendi* Court's explanation that the adequacy of the "procedure" of the state statute was at issue rather than the "substantive basis" of the statute, when correctly understood in light of the Court's immediately preceding sentence, merely referred to the fact that the substantive First Amendment issue regarding hate crime statutes was not before the Court. *See* 530 U.S. at 475.

maximum sentence based on a fact not found by a jury. Both those options demonstrate that the rule is substantive, and not merely procedural.

1. First, a court may interpret the statute at issue (under ordinary rules of statutory construction, in reliance on the rule of constitutional doubt, or otherwise) to construe the particular fact to be an element of the offense that must be submitted to the jury. *See, e.g., Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227 (1999). Persons previously convicted under erroneous interpretations of that statute, *i.e.*, interpretations that did not require proof of that fact beyond a reasonable doubt in order to convict, would be entitled to retroactive application of that interpretation. This is because the interpretation of the statute goes to the "substance" of what constitutes the crime. *See Apprendi*, 530 U.S. at 499 (Thomas, J., concurring); *Coleman v. United States*, 329 F.3d 77, 91 (2d Cir.) (B.D. Parker, J., concurring in judgment) ("The addition of an element naturally alters the meaning of a criminal statute."), *cert. denied*, 124 S. Ct. 840 (2003).

This Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), makes this point clear. In *Bousley*, the Court addressed whether its interpretation of a criminal statute in *Bailey v. United States*, 516 U.S. 137 (1995), should apply to persons whose convictions became final prior to the *Bailey* decision. *Bailey* had held, as a matter of statutory interpretation, that a conviction for "use" of a firearm under 18 U.S.C. § 924(c)(1) requires the government to show "active employment of the firearm." 516 U.S. at 144. In *Bousley*, the Court held that prisoners could rely on this interpretation to attack their convictions collaterally. The Court explained that its prior *Bailey* decision holding that a "criminal statute does not reach certain conduct" was "substantive" and thus the *Teague* bar against application to cases on collateral review was "inapplicable." 523 U.S. at 620.

The State suggests (Pet. Br. 12) that *Bousley*'s holding applies only to federal court interpretations of federal criminal laws. But the rationale of the Court is not so limited and there is no justification for so restricting it. The Court explained that it is the legislature, "and not the courts, which can make conduct criminal." *Id.* at 621. Thus, if a court determines, through interpretation of a statute, that the legislature did not intend to make certain conduct a crime (or intended certain conduct to constitute one crime rather than another), then a prior conviction rendered in contravention of that interpretation "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* at 620. Such a conviction would contravene one of the "principal functions of habeas corpus," which is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Ibid.* The Court thus declined to extend the judicially-created *Teague* doctrine to bar such claims.

Indeed, without expressly addressing *Teague*, the Court made a similar holding with regard to the applicability on federal habeas review of a state court interpretation of a state statute in *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Pennsylvania Supreme Court had interpreted a state criminal statute in an earlier case to require proof of certain conduct (*i.e.*, operating a hazardous waste facility without a permit). Fiore, who was convicted under that same state statute, but whose conviction was already final at the time of the decision, brought a federal habeas petition seeking to rely on the new state ruling interpreting the state statute. This Court unanimously held that, because the state court's decision was simply an interpretation of what the state criminal law had always meant, the new state court decision was the proper measure for determining the "element[s] of the crime of which Fiore was convicted" for purposes of determining the State's compliance with the Fourteenth Amendment. *Id.* at 229. The Court further concluded that Fiore was entitled to

habeas relief because there was insufficient evidence to show that he had committed "the elements of that crime beyond a reasonable doubt." *Ibid.*

Similarly, once a court interprets a statute in a manner that does not bring it into conflict with *Apprendi*, the application of that substantive interpretation of what constitutes a crime is not barred by *Teague* and can be relied upon in habeas proceedings even if the interpretation occurs subsequent to the conviction becoming final.

2. The alternative option available to a court faced with a statute that increases the statutorily authorized maximum sentence based on a particular fact is to interpret the statute to preclude the submission of the fact to a jury. A court may find such an approach dictated by the statutory text or legislative intent. If a criminal statute is read to call for a particular fact to be considered by the judge, rather than by the jury, and that fact (other than a prior conviction) would trigger an increased statutory maximum sentence, that portion of the statute as interpreted would be contrary to the Sixth and Fourteenth Amendments and, under *Apprendi*, would become inoperative. *See* U.S. Const. Art. VI, cl. 2 (Supremacy Clause). In that circumstance, the court must declare unconstitutional the portion of the statute authorizing reliance on the fact to increase the statutory maximum sentence (or the entire statute itself, if severance is not appropriate). Absent legislative action amending the statute to bring it into compliance with the Constitution, the State would be unable to sentence persons to the aggravated version of the crime that bears the increased maximum sentence.

Apprendi provides a good example of this. The New Jersey Supreme Court held that its legislature had intended, in the state criminal statute at issue, that a particular fact which increased the statutory maximum sentence not go before the jury, but be resolved by the judge alone. Accepting that interpretation of state law, this Court found

that the statute violated the Sixth and Fourteenth Amendments. But this Court did not reverse and remand with instructions to afford the defendant more process, nor to reduce the sentence to the maximum which would have applied without the unconstitutional enhancement based on the judge-found fact. Instead, the Court struck down the statute as unconstitutional and remanded for resentencing without use of the unconstitutional provision that increased the statutory maximum sentence. *See* 530 U.S. at 474, 491-492, 497; *see also State v. Kessler*, 73 P.3d 761, 772 (Kan. 2003) ("where the statutory procedure has been found unconstitutional [under *Apprendi*], the district court has no authority to impose such a sentence," even under procedures that comply with the Sixth Amendment). Similarly, on remand from this Court in *Ring*, the Arizona Supreme Court concluded that the "Supreme Court struck down Arizona's former capital sentencing statutes." *State v. Ring*, 65 P.3d 915, 933 (Ariz. 2003); *see also Woldt v. State*, 64 P.3d 256, 266-267 (Colo.) ("the statute under which [defendants] received their death sentences is unconstitutional on its face" after *Ring*), *cert. denied*, 124 S. Ct. 85 (2003).

It is true but irrelevant that a State can, in response to such a ruling, amend its statute so that, in the future, a jury would address the facts that trigger an increase in the statutory maximum. Any time a state criminal statute is struck down as unconstitutional, a State may enact an amended statute in an effort to overcome the constitutional infirmities. *See, e.g., Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 492-493 & n.19 (1983) (upholding Missouri criminal statute regulating abortions for minors that Missouri enacted after original statute was declared unconstitutional as a matter of substantive due process in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). That does not make the constitutional right at issue procedural, it simply shows that legislatures can respond to a constitutional ruling by adding elements to an offense that address the constitutional infirmity. *See Ring*, 536 U.S. at 606-607 (citing examples of

substantive constitutional rulings that could be remedied by the legislature through adding elements to a statute).

C. Even If *Ring* And *Apprendi* Are Treated As Only Procedural Rules, *Teague* Does Not Prohibit Their Application On Collateral Review Because They Involve Bedrock Rules That Enhance The Accuracy Of Convictions

Although the NACDL believes that it is clear that *Ring* and *Apprendi* involve substantive rules of constitutional law that are not barred by *Teague* from application on collateral review, we also address the alternative ground on which the court of appeals relied. We demonstrate that *Teague*'s second exception means that those rulings apply on habeas corpus even if they are deemed only procedural.

In assessing whether a rule falls within the second *Teague* exception, this Court has examined whether the rule "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This Court has repeatedly identified *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the paradigmatic example of a decision that satisfies the second *Teague* exception for retroactive application. *See, e.g., O'Dell v. Netherland*, 521 U.S. 151, 167 (1997); *Saffle*, 495 U.S. at 495. *Apprendi*, like *Gideon*, will in many criminal cases have a significant effect on the fairness of the trial and the accuracy of the result.

1. Because *Apprendi* establishes criteria for determining what facts constitute a part of a criminal offense, whether or not legislatively labeled "elements," it is substantive for the reasons set forth above. But it also triggers a range of fundamental procedural protections, including that the fact must be resolved by a jury, that the fact must be proven by the prosecution beyond a reasonable doubt, and that the fact must be proven using evidence that complies with the Confrontation Clause. *Cf. Washington v. Harper*, 494 U.S. 210, 220 (1990) (explaining that constitutionally required

procedures are influenced by contours of substantive constitutional right). The *Apprendi* rule, by expanding the scope of these fundamental procedural protections, reflects a revised understanding of the application and scope of all these rights, each of which is a bedrock procedural element. It thus constitutes a "watershed change in constitutional law." *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

Significantly, the jury trial right serves to guard against arbitrary abuses of power by the State as a bedrock procedural matter in criminal law. The historical foundation of the right to a jury in criminal matters was "'[t]o guard against a spirit of oppression and tyranny on the part of rulers,' and [to serve] 'as the great bulwark of [our] civil and political liberties.'" *Apprendi*, 530 U.S. at 477 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)). Indeed, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors * * * ." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (internal quotation marks omitted). Thus, by expanding the scope of the jury's authority (and concomitantly limiting that of the legislature to remove issues from the jury's control), *Apprendi* expanded in a significant way our understanding of the Sixth Amendment right to a jury by rejecting judicial determination of facts leading to an increase in the statutory maximum as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Apprendi*, 530 U.S. at 497.

2. The procedural consequences of *Ring* and *Apprendi* "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. *Ring* and *Apprendi* are not just about "who decides" under the Sixth Amendment, as the State and others have claimed. Pet. Br. 5, 7, 22-25; *see also* U.S. Br. 6, 7-8, 12, 15, 19-20. They also involve constitutional requirements about the level of proof necessary to support the particular factual finding at issue and the manner in which the decision is made,

including what evidence is admissible. These constitutional requirements all profoundly enhance fact-finding accuracy and reduce the risk of erroneous convictions.

a. Once a fact is determined, under either the rule of *Ring* or of *Apprendi*, to be part of a substantive offense that a jury must decide to authorize an increase in the statutory maximum sentence, the Constitution requires that the prosecution prove such a fact "beyond a reasonable doubt" in order to obtain a conviction. *Apprendi* repeatedly cited and discussed that constitutional requirement and the Court's relevant precedent, *e.g.*, *In re Winship*, 397 U.S. 358 (1970), ultimately ruling in an unequivocal manner that any fact (other than a prior conviction) that increases the statutory maximum punishment must not only be decided by a jury, but also be "proved beyond a reasonable doubt." 530 U.S. at 490; *see also id.* at 475-476 (noting that the question whether the defendant had a "constitutional right to have a jury find" the relevant fact "on the basis of proof beyond a reasonable doubt" was "starkly presented" in the case), 476, 477 n.3, 478, 484-485, 490. As the State acknowledges, the Court in *Ring* determined that *Apprendi*'s reasoning applies to the determination of aggravating factors in capital cases. Pet. Br. 14-15; U.S. Br. 26 n.5 (indicating that *Ring* requires proof beyond a reasonable doubt).

Thus, the State is wrong to suggest (Pet. Br. 7) that the rule of *Ring* does not affect "the quantum of proof necessary" to establish a fact that increases a statutory maximum. It is true that in *Ring* and in this case, the judge was required by Arizona law to apply a reasonable-doubt standard in determining the existence of the aggravating factors. *See Ring*, 536 U.S. at 597; U.S. Br. 26 n.5. The fortuity that state law already required the reasonable-doubt standard of proof in *Ring* and in this case does not alter the fact that, under *Ring* and *Apprendi*, that standard is now compelled as a federal constitutional matter.

Moreover, although the prior applicability of the standard in this particular case may be relevant in assessing whether

the constitutional violation warrants relief, the reality remains that, as a general matter, facts that are described as sentencing factors in noncapital cases, even if they affect the statutory maximum sentence, generally have been proved in the past by only a preponderance of the evidence standard. *See United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam). Indeed, the same low standard has sometimes been applied even in the capital context. In Montana, one of the other States that had allowed judges, rather than juries, to decide aggravating factors in capital cases, *see Ring*, 536 U.S. at 608 n.6, the judge was not required to find that the facts relating to the aggravating factors had been proved beyond a reasonable doubt. *See Fitzpatrick v. State*, 638 P.2d 1002, 1013, 1017 (Mont. 1981).

Thus, the rules of *Ring* and *Apprendi* will substantially improve the accuracy of fact-finding, as a general matter, by requiring that the relevant facts that increase a statutory maximum sentence be proved beyond a reasonable doubt. Increasing the burden of proof "is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. Indeed, it is a constitutional requirement that applies even when a defendant waives a jury trial. The reasonable-doubt burden of proof goes directly to the accuracy of the ultimate determination. It requires a fact-finder to hold a sufficient level of confidence in the accuracy of its determination to warrant deprivation of physical liberty. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 282 (1990) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'").

Consequently, this Court held that its decisions in *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), regarding the constitutional requirement of proof beyond a reasonable doubt in criminal cases were to be given

"complete retroactive effect." *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977). Although these cases were decided before *Teague*, their reasoning remains persuasive because they focused on precisely the question *Teague*'s second exception requires the Court to answer. As the Court explained in those cases, "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Ivan V.*, 407 U.S. at 205; *Hankerson*, 432 U.S. at 241. Indeed, in *Hankerson*, the Court declined to consider what the State argued would be the "devastating" impact on the "administration of justice" of holding *Mullaney* to be retroactive, explaining that "the reasonable-doubt standard of proof" removed such a "substantial" impediment to an accurate verdict that no balancing was appropriate, even under the pre-*Teague* retroactivity test. 432 U.S. at 243-244.

b. The rules of *Ring* and *Apprendi* also increase the accuracy of criminal convictions by triggering the Sixth Amendment's Confrontation Clause. Unlike in current sentencing proceedings, at which judges are generally free to consider hearsay and other evidence that would not be admissible at trial, s*ee Watts*, 519 U.S. at 156, the Sixth Amendment Confrontation Clause prohibits in criminal trials the admission of evidence that has traditionally been viewed as unreliable and guarantees defendants the right to cross-examine witnesses.[4] In this way, *Apprendi* extends the

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[4] The Due Process Clause imposes some limits, even at sentencing, on the use of hearsay evidence without providing a defendant an opportunity to rebut or challenge it. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977); *Specht v. Patterson*, 386 U.S. 605 (1967). But the Court has yet to hold that the protections of the Sixth Amendment's Confrontation Clause apply to that portion of the criminal proceeding. *See Mitchell v. United States*, 526 U.S. 314, 337 (1999) (Scalia, J., dissenting) (suggesting that Sixth Amendment's Confrontation Clause does not extend to sentencing). *But cf. Mempa v. Rhay*, 389 U.S. 128,

protections of the Confrontation Clause. Like the reasonable-doubt burden of proof, this constitutional safeguard applies to the guilt determination regardless of who makes that decision.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause generally precludes the prosecution from introducing out-of-court statements such as "ex parte affidavits," "depositions," and "confessions of accomplices" without the declarant being produced at trial. *Lilly v. Virginia*, 527 U.S. 116, 124-125 (1999). Although not all hearsay is excluded by the Sixth Amendment, the government may offer a declarant's out-of-court statement only if the declarant is unavailable and the statement is "sufficiently dependable," *i.e.*, "falls within a firmly rooted hearsay exception" or otherwise contains "particularized guarantees of trustworthiness." *Id.* at 124-125. This Court has long held that the Confrontation Clause's strong preference for live testimony is intended to provide the decision maker the ability to reach an accurate evaluation of the credibility of the witness. *See Mattox v. United States*, 156 U.S. 237, 242-243 (1895) (Confrontation Clause "compel[s] [the accuser] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

The Confrontation Clause also guarantees a criminal defendant the right to cross-examine the witnesses who testify against him at trial. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Cross-examination, in turn, has been described by this Court as "the 'greatest legal engine ever

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134 (1967) (Sixth Amendment grants defendant right to counsel at sentencing).

invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (footnote and citation omitted).

As with the reasonable-doubt standard announced in *Winship* and *Mullaney*, this Court applied its Confrontation Clause cases retroactively in the years preceding *Teague* based on their substantial importance to guaranteeing an accurate conviction. *See Berger v. California*, 393 U.S. 314, 315 (1969) ("one of the important objects of the right of confrontation [is] to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses" and thus "petitioner's inability to cross-examine [a witness] at trial may have had a significant effect on the 'integrity of the fact-finding process'"); *Roberts v. Russell*, 392 U.S. 293, 295 (1968) ("the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined"). The same should be true of *Ring* and *Apprendi*, which expand the scope of the accuracy-enhancing procedures embodied in both the Due Process and Confrontation Clauses.

c. In addition to the constitutionally mandated reasonable-doubt standard of proof and the constitutional protections regarding reliable evidence and cross-examination, all of which are designed to reduce the risk of wrongful conviction, the right to a jury as the decision maker at the guilt phase of a criminal proceeding also increases the accuracy of the proceeding.

"[J]uries are [the] best judges of facts." *Sparf v. United States*, 156 U.S. 51, 65 (1895) (quoting *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794)). The inherent superiority of juries on questions of fact is at its height in the criminal context. *See* 3 William Blackstone, *Commentaries on the Laws of England* 379 (Cooley 4th ed. 1899). More specifically, juries were traditionally entrusted with determining the facts that made a defendant "subject to capital punishment." *Ring*, 536 U.S. at 599.

A jury, composed of multiple citizens, is a better fact-finder than a single judge because the process of group

deliberation significantly improves accuracy. This Court directly recognized that fact when, in *Ballew v. Georgia*, 435 U.S. 223, 232 (1978), it struck down the use of five-member juries because reducing the number of jury members "leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." Moreover, requiring consensus among a group reduces the possibility that faulty reasoning, caused by errors in logic or, as in the record in this case suggests, the use of illegal drugs, could taint the decision making process. Pet. App. A12 & nn.1 & 2 (discussing record support for claim that the state trial judge who presided over respondent's capital trial was later disbarred for substance abuse, "was either having difficulty concentrating or experiencing short-term memory loss" during his trial, and "made some quite perplexing, if not unintelligible, statements at various times during the trial").

The representative view of a jury is especially important when the facts under consideration require the application of moral judgments to historical facts. For example, in considering whether the State has proved whether a defendant's conduct was "heinous, cruel and depraved," a fact-finder must determine the relative brutality of the crime and the defendant. *See, e.g.*, *Walton v. Arizona*, 497 U.S. 639, 655 (1990) ("the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision"). Also, in considering whether the State has proved an aggravating factor of a prior felony conviction "involving the use or threatened use of violence on another person," Pet. App. A13, a fact-finder must consider the circumstances of the prior conviction, which in respondent's case involved the brandishing of a knife at a man who had struck respondent's wife with an automobile. *Id.* at A3.

The State notes (Pet. Br. 8, 27-28) that this Court in *DeStefano v. Woods*, 392 U.S. 631 (1968), ruled that the case holding that the Sixth Amendment jury-trial guarantee applied to the States was not retroactive. But *DeStefano*

employed the very ad hoc balancing test that this Court abandoned in *Teague*. It held that the undisputed aggregate increase in accuracy (and reduction in "arbitrariness and repression") was outweighed by its determination that prior non-compliance with the Sixth Amendment was so widespread that "*all* convictions for serious crimes in [Louisiana] and certain other States would be in jeopardy." *Id.* at 634 (emphasis added). More relevant to the *Teague* inquiry is the Court's subsequent decision in *Brown v. Louisiana*, 447 U.S. 323 (1980), in which the Court gave retroactive effect to the rule requiring a unanimous six-person jury in state criminal trials. The Court there stated that it is "difficult to envision a constitutional rule that more fundamentally implicates the fairness of the trial – the very integrity of the fact-finding process." *Id.* at 334 (plurality) (citation omitted). The same is true of *Ring* and *Apprendi*.

D. The State And Its Supporting *Amici* Overstate The Likely Impact That An Award Of Relief To Respondent Would Have By Ignoring The Limitations On Relief In Other Cases, Including Federal Drug Convictions Under 21 U.S.C. § 841

As noted at the outset of our argument, the State and its *amici* contend that one of the reasons that the rules of *Ring* and *Apprendi* should not be applied retroactively to cases on collateral review is because so many cases would be affected that it would constitute an unwarranted burden on the courts and the justice system. *See* pages 5-6, *supra*. As explained above, *see* pages 6-9, *supra*, such considerations are not appropriate under *Teague* in light of its intended departure from the Court's earlier ad hoc balancing test that included consideration of a rule's impact on the "administration of justice." *Teague*, 489 U.S. at 302. Having established a rule that attempted to create some measure of predictability by articulating in advance the legal determinations relevant to retroactive application, it would be counterproductive to permit those factors to influence the decision in a "hard" case.

In any event, even if it were appropriate to rely on the possible number of cases affected by a retroactivity ruling as a ground for refusing to give a rule retroactive effect, the practical impact of retroactive application of *Ring* and *Apprendi* is not what the State and its *amici* suggest. They disregard the numerous procedural hurdles that must be overcome by a criminal defendant seeking habeas corpus or other collateral relief. Moreover, the State and the United States both prominently cite numerous cases under 21 U.S.C. § 841 that have addressed the application of *Teague* to *Apprendi* (Pet. Br. 15, 29-30; U.S. Br. 13-14 & n.1), but they do not acknowledge the very limited relief that habeas petitioners have received in cases where lower courts have applied the rule retroactively.

1. The Court is well familiar with the myriad procedural hurdles in federal habeas corpus proceedings that make it unlikely that as many prisoners as the State suggests will be able to take advantage of *Ring* or *Apprendi*, if they are determined to be retroactive. Respondent is the unusual federal habeas petitioner who is litigating a first habeas petition, does not face a procedural bar for failure to raise his federal constitutional claim on direct appeal, and whose claims are not governed by the restrictions on relief established by Congress in 1996 under AEDPA. Most other defendants will face hurdles on some or all three fronts – a successive petition, procedural default, and AEDPA restrictions on timing and scope of relief.

Most significantly perhaps, a federal habeas petitioner, whether on an initial or successive petition, will often face the consequences of not having properly raised his federal constitutional claim on direct appeal. If the State relies on this affirmative defense and the prisoner has procedurally defaulted a claim, the claim may be raised on habeas review only if the prisoner can first demonstrate that there was "cause" for the default and that "prejudice" resulted, or that he is "actually innocent." *Bousley*, 523 U.S. at 622. This Court's decisions have made clear that those are not easy

standards to meet. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

In addition, in any case where the federal habeas petition was filed on or after April 24, 1996, the case is governed by AEDPA, which provides that habeas relief on claims adjudicated in state court is appropriate where the state court ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Also, state and federal prisoners would ordinarily have only one year within which to file a habeas corpus petition. *See* 28 U.S.C. §§ 2244(d), 2255.

2. For those defendants who overcome the various procedural hurdles on collateral review and establish that the constitutional error affected their sentence, relief is appropriate. But the fact is that, in many instances, including most all convictions under 21 U.S.C. § 841, relief would, at most, simply reduce extremely long terms of imprisonment to terms that are still lengthy.

The limited effect of retroactive application of *Apprendi* on criminal prosecutions is illustrated by review of lower court decisions that have applied *Apprendi* retroactively in cases involving convictions under the federal drug trafficking statute. *See* 21 U.S.C. § 841(b)(1)(A), (B). The limited universe of such cases is due to the appellate courts' subsequent rejection of such rulings, *see* Pet. Br. 15, 29-30, but similar results could be expected in other cases if this Court were to apply *Apprendi* retroactively.[5]

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[5] This Court has not yet decided the important question whether the type and quantity of a controlled substance is an element of the offense under 21 U.S.C. § 841. That issue is pending before the Court in *Goodine v. United States*, No. 03-596 (pet. filed Oct. 16, 2003). The NACDL filed an *amicus* brief in support of the petition demonstrating that Congress intended the threshold drug quantities set forth in Section 841(b) to constitute offense elements, based on the statutory language,

First, *Apprendi* does not undermine any maximum sentence that was increased based on a prior felony drug conviction in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The increase of a maximum sentence based on a prior conviction not found by a jury does not violate the Sixth Amendment under that precedent.[6]

Second, under *Harris v. United States*, 536 U.S. 545 (2002), the rule of *Apprendi* does not prohibit a judge, based on facts not found by the jury, from imposing an increased statutory mandatory minimum sentence that does not also increase the statutory maximum sentence.

Moreover, even within the universe of Section 841 cases where *Apprendi* would apply retroactively on collateral review, certain defendants have received no relief at all because the court found no *Apprendi* error. Such rulings have relied on a wide range of circumstances. In one case, the relevant facts regarding the type and quantity of drugs had been submitted to the jury at the original trial in 1986. *See Jackson v. United States*, 129 F. Supp. 2d 1053, 1069 (E.D. Mich. 2001), *rev'd on other grounds*, 45 Fed. Appx. 382 (6th Cir. 2002). That should be true in some other cases as well inasmuch as the Department of Justice initially recommended that drug type and quantity "be specified in the indictment and proven at trial." U.S. Dep't of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at 20 (Mar. 1987).

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structure, and context, and the legislative history, and in light of the need to avoid the grave doubt as to the constitutionality of Section 841 that would otherwise arise under *Apprendi*.

[6] Indeed, even if the Court were to reverse *Almendarez-Torres*, evidence of a prior conviction, unlike evidence concerning the circumstances of the drugs underlying a conviction, would often be unassailable because the proof of such a fact through documentary evidence is so straightforward, except in such unusual circumstances as a defendant who claims that he is not the same person identified in the documentary evidence.

In addition, in other cases, courts have found other grounds for concluding that the error did not warrant habeas relief. Courts have concluded that the jury would have found the quantity of drugs beyond a reasonable doubt, *see Concepcion v. United States*, 181 F. Supp. 2d 206, 232 (E.D.N.Y. 2002), or that it was "inconceivable" that the jury would necessarily have found that the drug quantity was less than what the judge had found, *see Rosario v. United States*, 2001 U.S. Dist. LEXIS 13384, at *6-*7 (S.D.N.Y. Aug. 30, 2001). *But see United States v. Jordan*, 291 F.3d 1091, 1096-1097 (9th Cir. 2002) (suggesting government will have difficulty proving that error was harmless because "there are too many unknowns" regarding how defendant would have defended against allegations about drug quantity if it had been before the jury).

Other courts have relied on the fact that the defendant had been convicted on two counts of drug conspiracy resulting in a combined maximum sentence that exceeded the sentence imposed. *See United States v. Jenkins*, 333 F.3d 151, 155 (3d Cir.) (alternative holding), *cert. denied*, 124 S. Ct. 350 (2003); *United States v. Hernandez*, 137 F. Supp. 2d 919, 929-932 (N.D. Ohio 2001).

Still other courts have found harmless error because the sentence imposed did not exceed the 20-year statutory maximum sentence for the lesser offense involving any amount of most schedule I or II controlled substance under 21 U.S.C. § 841(b)(1)(C). *See McCoy v. United States*, 266 F.3d 1245, 1270 (11th Cir. 2001) (Barkett, J., concurring in result), *cert. denied*, 536 U.S. 906 (2002); *Rosario*, 2001 U.S. Dist. LEXIS 13384, at *6-*7; *Parise v. United States*, 117 F. Supp. 2d 204, 209 n.1 (D. Conn. 2000).

And in other cases, the court has reduced the sentence to that 20-year maximum. *See Darity v. United States*, 124 F. Supp. 2d 355, 360-361 (W.D.N.C. 2000) (384 months reduced to 240 months), *rev'd*, 22 Fed. Appx. 277 (4th Cir. 2001), *cert. denied*, 535 U.S. 1042 (2002); *see also United States v. Jones*, 2001 U.S. Dist. LEXIS 1740, at *15 (E.D.

La. Feb. 9, 2001) (where defendant had prior felony drug conviction, court reduced life sentence to 30 years' imprisonment, which is statutory mandatory for the lesser offense under Section 841(b)(1)(C) for defendant who has such a prior conviction). Of course, reduction of a drug conviction sentence to 20 years' imprisonment (or 30 years' for a recidivist) means that the original sentence imposed was exceptionally long, even under the draconian federal drug statutes, and such a reduction does not affect the sentence imposed for any other charge. *See United States v. Murphy*, 109 F. Supp. 2d 1059, 1066 (D. Minn. 2000) (300 months plus five year consecutive sentence under 18 U.S.C. § 924(c)(1) for use of a firearm, reduced to 240 months plus same five year consecutive sentence), *rev'd*, 268 F.3d 599 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002).[7]

In sum, the circumstances of Section 841 cases are a far cry from the situation in *Bailey* and *Bousley*, where every conviction under the statute resulted in a mandatory, five-year sentence *consecutive* to any other sentence imposed. *See* 18 U.S.C. § 924(c)(1). Thus, every prisoner whose case fell within the *Bailey* ruling could make a threshold showing of prejudice because he necessarily received five additional years of imprisonment on that charge (subject, in some cases, to a partially offsetting adjustment under the Sentencing Guidelines). Yet, even with the widespread reliance by the federal government on that statute, neither the State nor the federal government demonstrate that collateral proceedings

[7] In addition to the quantity and type of controlled substance, a defendant's statutory maximum sentence may be increased in Section 841 cases to life imprisonment if "death or serious bodily injury results from the use of such [controlled] substance." 21 U.S.C. § 841(b)(1)(A), (B), (C). Such cases are not common and involve unusual evidence and proof connecting a particular drug transaction to use by a particular individual who was then seriously injured. In NACDL's view, such circumstances constitute elements of an aggravated drug offense, as they are generally treated, in fact, when prosecuted. And, of course, even in such circumstances, *Apprendi* would not affect any separate conviction for an independent federal offense involving violence or death.

concerning *Bailey* constituted an unwarranted burden on the federal courts.

Nor is there any evidence that habeas corpus petitions from state prisoners raising *Apprendi* claims will be a significant burden. Although the State's *amici* assert, in a conclusory manner, that "untold numbers" of state cases will be affected if *Apprendi* is held retroactive, Br. of Nebraska and 15 Other States as *Amici Curiae* 21, they fail to cite any evidence to that effect. The absence of evidence is particularly noteworthy because in Texas – one of the States that filed the *amicus* brief – the state's highest criminal court held more than two years ago that *Apprendi* applied retroactively in state habeas proceedings. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001). Yet there is no sign in reported opinions or legal commentary that Texas courts have been unduly burdened by *Apprendi* claims. *Cf. Apprendi*, 530 U.S. at 564-565 (Breyer, J., dissenting) (noting that lack of evidence regarding potential effect of *Apprendi* "may suggest" that "concerns about disruption are overstated"). Denial of retroactive application of fundamental constitutional rights should not be premised on such unsubstantiated claims.

Under the settled principles of retroactivity developed in *Teague* and *Bousley*, the rules articulated by this Court in *Ring* and *Apprendi* should be applied to petitions for habeas corpus seeking relief for violations of those rules. "*Apprendi* is now the law, and its holding must be implemented in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

CONCLUSION

For the reasons set forth above and in the respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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